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LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT

LEGAL PROBLEMS
THE FAR EASTERN CONFLICT

PART I

THE LEGAL BACKGROUND IN THE FAR EAST

By

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PART II

THE PROBLEM OF NON-RECOGNITION

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FOREWORD

This study forms part of the documentation of an Inquiry organized by the Institute of Pacific Relations into the problems arising from the conflict in the Far East.

It has been prepared by Professor Quincy Wright, Professor of International Law, University of Chicago; author of *Mandates Under the League of Nations* (1930), *The Causes of War and the Conditions of Peace* (1935), and *Diplomatic Machinery in the Pacific Area* (1936); Professor H. Lauterpacht, Professor of International Law, University of Cambridge; Dr. Edwin M. Borchard, Professor of Law, Yale University, and Phoebe Morrison, School of Law, Yale University.

The study has been submitted in draft to a number of authorities including the following, many of whom made suggestions and criticisms which were of great value in the process of revision: Professor W. W. Willoughby, Professor G. W. Keeton, Professor Philip C. Jessup, and Dr. P. E. Corbett.

Though many of the comments received have been incorporated in the final text, the above authorities do not of course accept responsibility for the study. The statements of fact or of opinion appearing herein do not represent the views of the Institute of Pacific Relations or of the Pacific Council or of any of the National Councils. Such statements are made on the sole responsibility of the author. The Japanese Council has not found it possible to participate in the Inquiry, and assumes, therefore, no responsibility either for its results or for its organization.

In the general conduct of this Inquiry into the problems arising from the conflict in the Far East the Institute has benefited by the counsel of the following Advisers:

Professor H. F. Angus of the University of British Columbia

Dr. J. B. Condliffe of the London School of Economics

M. Étienne Dennery of the École des Sciences Politiques.

These Advisers have co-operated with the Chairman and the Secretary-General in an effort to insure that the publications issued in connection with the Inquiry conform to a proper standard of sound and impartial scholarship. Each manuscript has been submitted to at least two of the Advisers and although they do not necessarily subscribe to the statements or views in this or any of the studies, they consider this study to be a useful contribution to the subject of the Inquiry.

The purpose of this Inquiry is to relate unofficial scholarship to the problems arising from the present situation in the Far East. Its purpose is to provide members of the Institute in all countries and the members of I.P.R. Conferences with an impartial and constructive analysis of the situation in the Far East with a view to indicating the major issues which must be considered in any future adjustment of international relations in

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Part I

THE LEGAL BACKGROUND IN THE FAR EAST

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INTRODUCTION

It is important to ascertain the existing legal situation in the Far East because any conclusive settlement of the present hostilities must take its point of departure from that situation. The members of the League of Nations, the United States and other states have inferred from the Covenant and the Pact of Paris that they should not recognize situations brought about by methods contrary to the provisions of these instruments.[1] The parties to the Argentine Anti-War Treaty[2] and the Inter-Ameri-

[1] The League Assembly resolution of March 11, 1932, provided, "It is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris." The note of 12 members of the Council on February 16, 1932, had drawn the attention of Japan to Article 10 of the Covenant from which it "appeared to them to follow that no infringement of the territorial integrity and no change in the political independence of any member of the League ought to be recognized as valid and effectual by members of the League of Nations." In a note to China and Japan of January 7, 1932, the United States had stated "that it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant and obligation of the Pact of Paris of August 27th, 1928, to which both China and Japan as well as the United States are parties." Nineteen American Republics declared on August 3, 1932, "that they will not recognize any territorial arrangements of this controversy [between Bolivia and Paraguay] which has not been obtained by peaceful means nor the validity of the territorial acquisitions which may be obtained through occupation or conquest by force of arms." This resolution was referred to in the resolution of July 4, 1935, by which the League of Nations Assembly recommended removal of sanctions against Italy but "remained firmly attached to the principles of the Covenant, which are expressed in other diplomatic instruments such as the Declaration of the American States dated August 3, 1932, excluding the settlement of territorial question by force." See also Budapest Articles of Interpretation of the Pact of Paris asserting that "The signatory States [of the Pact] are not entitled to recognize as acquired *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Pact." (International Law Association, Report of 38th Conference, 1934, p. 67; Q. Wright, "The Stimson Note of January 7, 1932," *Am. Journ. Int. Law*, Vol. 26, pp. 342ff. (April 1932); "The Legal Foundations of the Stimson Doctrine," *Pacific Affairs*, December 1935, Vol. 8, pp. 439ff.

[2] Article 2 provides: "They declare that as between the high contracting parties territorial questions must not be settled by violence, and that they will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms." (*U. S. Treaty Series*, No. 906.)

can Treaty on Rights and Duties of States[3] have accepted this obligation explicitly. Every state in the world is a party to at least one of these instruments.[4] Although the "Stimson doctrine" was not applied in the case of the German annexation of Austria,[5] and many derogations from it have occurred in the case of Ethiopia,[6] it has been generally observed in connection with the Far East. Salvador,[7] Italy,[8] Germany,[9] and Poland[10] as well as Japan have, it is true, recognized the state of "Manchukuo," contrary to the resolution of the League of Nations Assembly on February 24, 1933, which provided as follows:

The Assembly has adopted the principles laid down by the president in office of the Council in his declaration of December 10, 1931, and has recalled the fact that twelve members of the Council had again invoked those

[3] Article 11 provides: "The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily." (*U. S. Treaty Series,* No. 881.)

[4] The participation of states in the Covenant, the Pact and the anti-war treaty in 1936 is indicated in a table in *Neutrality and Collective Security* (Q. Wright, ed.), Chicago, 1936, p. 260.

[5] See Q. Wright, "The Denunciation of Treaty Violators," *Am. Journal Int. Law,* July 1938, Vol. 32, p. 534.

[6] See Debate in League of Nations Council, May 17, 1938, on "the consequences arising out of the existing situation in Ethiopia." No resolution was passed, but the president of the Council summarized the discussion, saying: "It was, however, clear that in spite of regrets which had been expressed, the great majority of the Members of the Council felt that so far as the question under discussion was concerned, it was for the individual Members of the League to determine their attitude in the light of their own situation and their own obligations." (*Monthly Summary of the League of Nations,* May 1938, Vol. 18, p. 102.)

[7] On April 6, 1933. The Chinese representative stated in the Assembly in September 1934 that his country considered "such action inconsistent with the Covenant, a proper matter for League review and discipline, and believes that no other Member State will ever in like manner disregard international justice and violate the findings of a unanimous report and its most solemn obligations under that report." (See W. W. Willoughby, *The Sino-Japanese Controversy and the League of Nations,* Baltimore, 1935, pp. 514, 534.) Salvador gave notice of withdrawal from the League on July 26, 1937.

[8] November 29, 1937. See Royal Institute of International Affairs, *Bulletin of International News,* December 11, 1937, Vol. 14, p. 28.

[9] May 12, 1938. *Ibid.,* May 21, 1938, Vol. 15, p. 20. Hitler announced this decision in a Reichstag speech on February 20, 1938. *Ibid.,* March 5, 1938, Vol. 15, p. 25.

[10] October 19, 1938. *Ibid.,* Nov. 5, 1938, Vol. 15, p. 35; American Council, I.P.R., *Far Eastern Survey,* Vol. VII, November 23, 1938, p. 271.

principles in their appeal to the Japanese government on February 16, 1932, when they declared that no infringement of the territorial integrity and no change in the political independence of any member of the League brought about in disregard of Article X of the Covenant ought to be recognized as valid and effectual by members of the League.

The Assembly has stated its opinion that the principles governing international relations and the peaceful settlement of disputes between members of the League above referred to, are in full harmony with the Pact of Paris. Pending the steps which it might ultimately take toward the settlement of a dispute which has been referred to it, it has proclaimed the binding nature of the principles and provisions referred to above, and declared that it was incumbent upon the members of the League not to recognize any situation, treaty or agreement which might be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.

Lastly, the Assembly has affirmed that it is contrary to the spirit of the Covenant that the settlement of the Sino-Japanese dispute should be sought under the stress of military pressure on the part of either party, and has recalled the resolutions adopted by the Council on September 30 and December 10, 1931, in agreement with the parties. . . .

In view of the special circumstances of the case, the recommendations made do not provide for a mere return to the *status quo* existing before September 1931. They likewise exclude the maintenance and recognition of the existing régime in Manchuria, such maintenance and recognition being incompatible with the fundamental principles of existing international obligations and with a good understanding between the two countries on which peace in the Far East depends.

It follows that, in adopting the present report, the members of the League intend to abstain, particularly as regards the existing régime in Manchuria, from any act which might prejudice or delay the carrying out of the recommendations of the said report. They will continue not to recognize this régime either *de jure* or *de facto*. They intend to abstain from taking any isolated action with regard to the situation in Manchuria and to continue to concert their action among themselves as well as with the interests of states not members of the League.

Salvador apparently recognized "Manchukuo" by inadvertence.[11] Germany and Italy did so after they had embarked upon activities of their own in violation of international law and treaty,[12] had withdrawn from the League,[13] and had allied them-

[11] Willoughby, *Sino-Japanese Controversy*, p. 534. League of Nations, *Official Journal*, 1934, pp. 964-7.

[12] The League Council declared the German invasion of the demilitarized zone of the Rhineland on March 7, 1936, "a breach of Article 43 of the Treaty of Versailles" (League of Nations, *Monthly Summary*, March 1936, Vol. 16, p. 78. See also Q. Wright, "The Rhineland Occupation," *Am. Journ. Int. Law*, July 1936, Vol. 30, p. 487. Fifty members of the League accepted the report of the Committee of Six declaring the Italian government by invading Ethiopia on October 2, 1935, "has resorted to war in disregard of its Covenant under Article

selves with Japan.[14] It is not to be assumed that other states will follow their example. Stability in the Far East seems unlikely until the existing *de jure* situation has been restored in fact, or a new situation has been developed by legal procedures from that *de jure* situation.[15] In either case it is pertinent to know what the present *de jure* situation is.

Obviously a complete study of the legal situation in the Far East is not possible within the compass of this memorandum. Such a study would involve an exposition of the rules and principles of general international law, of the stipulations of numerous treaties, agreements, and other instruments among Far Eastern powers, and, perhaps, of certain claims and practices which have acquired a legal force in the Far East generally or in special areas thereof, through the influence of custom or prescription.

This study will be confined to a consideration of (1) the ways in which the *de facto* situation in the Far East has departed from the *de jure* situation, (2) the criteria for determining the latter, (3) the status of the territories of the Far East, (4) the jural personalities with Far Eastern territorial interests, (5) the territorial rights in the Far East and (6) certain peculiarities in the jural relations of China and Japan and of each to other states with Far Eastern interests.

12 of the Covenant of the League of Nations." (*Min. 89th Sess. of Council,* Oct. 8, 1935, pp. 7-9.)

[13] Germany gave notice of its withdrawal on October 19, 1933. This became effective October 19, 1935. Italy gave notice of withdrawal on December 11, 1937, to become effective December 11, 1939. Japan gave notice on March 27, 1933, to become effective March 27, 1935.

[14] Italy became a party to the Anti-Communist Pact previously existing between Germany and Japan by the protocol signed at Rome on November 6, 1937. (*Bull. Int. News,* Nov. 13, 1937, Vol. 14, p. 36.)

[15] In response to a statement of Mr. Amau Eiji, Japanese Foreign Office spokesman, on April 18, 1935, that "we consider it only natural that to keep peace and order in East Asia we must even act alone on our own responsibility and it is our duty to perform it," Secretary of State Hull said on April 30, 1935, "No nation can, without the assent of the other nations concerned, rightfully endeavor to make conclusive its will in situations in which are involved the rights, obligations and legitimate interests of other sovereign states." British Foreign Secretary Sir John Simon made a similar statement at the time. (See Roy H. Akagi, *Japan's Foreign Relations,* Tokyo, 1936, p. 539.)

CHAPTER I

LAW AND FACTS

The relations of the members of the Community of Nations to each other are defined *de jure* by the system of international law, and *de facto* by the attitudes, policies and acts of those states. While international law does not directly prescribe the attitudes which states may have toward each other, or the policies which they may pursue, it does limit the acts which are permissible. Thus indirectly, it discourages attitudes conducive to illegal acts and policies unattainable except by illegal procedures.[1] Since the Community of Nations has not succeeded in organizing sanctions which are invariably effective in enforcing law, but relies mainly on the good faith of states to observe their obligations, it sometimes happens that the *de facto* relations do not accord with the *de jure* relations of particular states.

Such a situation tends to be rectified in time either by a restoration of the *de jure* situation in fact, or by the *de facto* situation acquiring a *de jure* status through general recognition. The latter may be implied in the course of time through the influence of custom as a source of law and prescription as a source of rights. Where, however, a *de facto* situation contrary to law is not acquiesced in, nor expressly recognized by other states, but on the contrary is protested, this rectification can take place only by an accepted process of international legislation, usually requiring unanimous consent of all interested states.

In the Far East there are special circumstances which increase the difficulty of keeping the *de facto* situation in harmony with the *de jure* system. These stem from the fact that the Far Eastern states were admitted relatively recently to the Family of Nations, prior to which those states neither acknowledged nor understood

[1] "Law cannot control national policy. But law, if enforced, can control the external steps by which a nation seeks to follow a policy and rules may be so framed that a policy of aggression cannot be worked out except through open violations of law which will meet the protest and condemnation of the world at large, backed by whatever means shall have been devised for law enforcement." Elihu Root, "The Outlook for International Law," *Proc. Am. Soc. Int. Law*, 1915.

the system of international law which European states regarded as binding *inter se*, and the European states, on their part, with a great superiority of military power until very recently, did not consider this system applicable in the Far East. While theoretically the applicability of international law is now acknowledged by both Eastern and Western states, the practices of the earlier period tend to persist and are reflected in certain peculiarities in the relations of states in the Far East growing from this circumstance which may be noted:

(1) The practice of impartial international adjudication, while not adequately developed among the Western states themselves, is more developed among them than it is in the relations of the Eastern states among themselves or with the Western states. There are no bilateral pacific settlement obligations between China and Japan.[2] Each of these states has very few such treaties with other states. They are, it is true, both parties to the Hague Conventions for pacific settlement of international disputes which, however, impose no obligation to submit to any particular form of adjudication. China was a party to the optional clause of the statute of the Permanent Court of International Justice until 1927, but in the one case in which this clause was invoked China was reluctant to submit to the jurisdiction which had been unilaterally invoked by Belgium, and the latter withdrew the case after a preliminary treaty had settled the difference. In practice, arbitration has rarely been resorted to by Far Eastern states, although China, as a member of the League of Nations, has submitted its political controversies to the procedure provided by the Covenant[3] and expressed a willingness to submit controversies over treaty interpretation to an appropriate form of adjudication. Japan, however, has consistently refused to submit the validity and interpretation of its treaties with China to judicial process.[4]

This absence of a continuous process of impartial adjudica-

[2] See Q. Wright, *Diplomatic Machinery in the Pacific Area*, Institute of Pacific Relations, 1936, reprinted in part in *Problems of the Pacific, 1936*, pp. 409ff.

[3] After having failed to induce the League of Nations to attempt to modify the régime of extraterritoriality by reference to Article 19 of the Covenant, China took action in the matter which amounted to unilateral denunciation of treaty obligations. See also Chapter 6, note 65.

[4] See Communication from Chinese representative to League of Nations Council, Oct. 24, 1931, quoted, Willoughby, *Sino-Japanese Controversy*, p. 128; and Q. Wright, "The Manchurian Crisis," *Am. Pol. Sci. Rev.*, Feb. 1932, Vol. 26, p. 64.

tion has made it possible for states to misinterpret and misapply general principles of international law and valid treaties, thus permitting *de facto* situations to grow up contrary to law. Thus, for example, the scope of the treaties providing for extraterritoriality in China, the influence of changed conditions upon the validity of these treaties, and the power of China to denounce them are all problems of international law and treaty interpretation which have not been passed upon by impartial authority.[5]

(2) The conditions of frequent civil war and intervention, which have characterized Chinese history since formal relations with the West began in 1842, have resulted in a number of treaties and international agreements, which, though valid on the face, may lack validity under general international law. Notorious among such agreements are the so-called Twenty-one Demands Treaties of May 25, 1915, the validity of which has been challenged by China on the grounds that they were not approved by the proper constitutional authority of China, that they were made under threats of violence, and that China's subsequent entry into the war against Germany altered the fundamental conditions upon which they were based. Japan has acted on the assumption that these agreements are valid, but the matter has never been submitted to any form of international adjudication.[6] While the Lytton Commission stated the contentions of both parties it did not state a conclusion on the issue of validity.[7] The attitude of the Commission was similar in regard to the alleged agreement of 1905 concerning parallel railway lines in Manchuria. "The determination," wrote the Commission, "of the question whether this entry into the minutes of the Peking Conference constituted, from an international legal point of view, a binding agreement, and whether, if so, there is

[5] The latter question was submitted to the court by China and Belgium but withdrawn by mutual consent before judgment. *Per. Ct. Int. Justice,* Ser. A, Nos. 8, 14, 16, 18. See also M. T. Z. Tyau, *The Legal Obligations Arising out of Treaty Relations between China and other States,* Shanghai, 1917, pp. 201-2.

[6] It was discussed at the Peace Conference of 1919 and the Washington Conference of 1922. See *The Shantung Question, A statement of China's Claims together with important Documents submitted to the Peace Conference in Paris,* Chinese National Welfare Society in America, August 1, 1919, pp. 75ff.; H. S. Quigley, "Legal Phases of the Shantung Question," *Minn. Law Rev.,* April 1922, pp. 380ff.; W. W. Willoughby, *Foreign Rights and Interests in China,* Baltimore, 1927, Vol. 1, pp. 229ff.

[7] League of Nations, *Appeal by the Chinese Government, Report of the Commission of Enquiry* (Political, 1932, VII, 12), pp. 49ff.

but one interpretation which may reasonably be placed upon it, was properly a matter for judgment by an impartial judicial tribunal."[8] Such a judgment, however, has never been given. In so far as action is based upon instruments which an impartial application of international law would hold to be invalid but which the acting party refuses to submit to adjudication, the facts are out of harmony with the law.

(3) The existence of extraterritoriality in China has resulted in the practice of treating Chinese concessions to foreign railway corporations, Chinese agreements for loans from foreign bankers, Chinese concessions of residential areas to foreign governments, consuls or individuals as though they were cessions of jurisdiction.

John V. A. MacMurray thus explains the situation in the preface to his edition of *Treaties and Agreements with and concerning China, 1894-1919*,[9] enlarging and superseding the similar collection by W. W. Rockhill, covering the period 1894-1904.

> The underlying principle of Mr. Rockhill's collection was his appreciation of the fact that, with the Japanese war, China entered upon a new course of national development, the history of which is to be read not only—nor even primarily—in the treaties and other formal international engagements, but rather in the arrangements of nominally private character, with syndicates or firms of foreign nationality, under which the Chinese government then began to incur a complex and far-reaching set of obligations and commitments, in which the financial or economic elements are often merged indistinguishably with political considerations. . . . The result of this merging of individual with governmental interests has been that matters which would elsewhere be of merely commercial character, susceptible of judicial determination in case of dispute, are in China matters of international political concern, for the settlement of which the ultimate recourse is to diplomatic action. It is thus in a sense true that the international status of the Chinese government is determined and conditioned by its business contracts with individual foreign firms or syndicates, scarcely if at all less than by its formal treaties with other governments. It is, at any rate, seldom that any international situation relating to China can be fully understood without reference to the intricate fabric of quasi-public as well as of public obligations which qualify the freedom of action of the Chinese government.

Extraterritoriality has been of great importance in leading to

[8] *Ibid.*, p. 44.

[9] N. Y., Oxford University Press, 1921, pp. xiii, xv.

this situation.[10] Apart from China, it has been recognized that an agreement between a state, on the one hand, and a foreign individual or corporation, on the other, is not a treaty or even a document of international law. Such an instrument does not create international obligations; nor is it to be interpreted by an international procedure; nor does international law furnish the standard of interpretation.[11] The appropriate municipal forum to interpret and apply such an instrument, and the appropriate municipal law to utilize for that purpose, are questions of conflict of laws or private international law. Where, as is usually the case, the agreement is to be executed in the territory of a state party to it, that state's own law would generally apply and its own courts would have jurisdiction.[12] Thus such agreements can only become a subject of international litigation after the individual interested has exhausted local remedies and then only if his government is convinced that the conduct of the contracting state to his injury has been contrary to that state's duties under public international law or treaty. The international obligation of that state follows, not from the terms of the agreement, but from the rule of general international law requiring a state to accord a certain minimum recognition and protection to the vested rights of the nationals of other states.

[10] The following paragraphs are from the author's "Some Legal Consequences if Extraterritoriality is Abolished in China," *Am. Journ. Int. Law*, April 1930, Vol. 24, pp. 221ff. See also H. S. Quigley, "Extraterritoriality in China," *Am. Journ. Int. Law*, January 1926, Vol. 20, pp. 46ff., 68.

[11] In the Mavrommatis Palestine Concession Case the Permanent Court of International Justice recognized that concessions given by the Palestine administration and by its predecessor, Turkey, to a Greek national were not themselves "international obligations accepted by the mandatory," though Protocol XII of the Lausanne Treaty, which required respect for the latter type of concessions, was. *Pub. Per. Ct. Int. Just.*, Ser. A, III, 19, 27ff., XI, 15-16. The importance of the distinction between "agreements coming within the sphere of international law" and other agreements was recognized by the Supreme Court of Cologne in Aix-la-Chapelle-Maastricht Railroad Co. vs. Thewis, *Am. Journ. Int. Law*, Vol. 8, p. 907; Dickinson, *The Law of Nations, Cases and Other Readings*, N. Y., 1929, p. 397.

[12] This was contended by Great Britain in regard to the Mavrommatis Palestine Concession, and the court acquiesced, though the point was not necessary for decision, *Pub. P.C.I.J.*, Ser. A, XI, 13, 23. W. E. Hall has even contended that the local law furnishes the standard for interpreting treaties to be executed within a state (8th ed., p. 392), but the Permanent Court of International Justice has held that international law rather than the local law of either party must rule in the case of a treaty unless there is express evidence of a different intention shared by both parties. ("Exchange of Greek and Turkish Populations," *Pub. P.C.I.J.*, Ser. B, X, 20-1.)

Only insofar as the municipal law, applicable at the time the instrument was made, vested in the alien rights defined by the instrument, is there a basis for subsequent diplomatic complaint.[13]

Under extraterritoriality the rule requiring the exhaustion of local remedies has become inapplicable in most cases because Chinese courts have generally been deprived of jurisdiction in cases affecting the rights of foreigners under such instruments. The normal presumption of a loan contract, a railroad concession or a lease of land to an individual or corporation is that it confers only rights of economic utilization and exploitation, the territorial sovereign retaining full jurisdiction and, with certain exceptions, Chinese contracts, concessions and leases are susceptible of this interpretation. In fact, Article I of the Sino-American treaty of 1858 expressly stated the Chinese Emperor's opinion "that in making concessions to the citizens or subjects of foreign powers of the privilege of residing on certain tracts of land, or resorting to certain waters of that empire for purposes of trade, he has by no means relinquished his right of eminent domain or dominion over said land and waters," and then provided that "if any right or interest in any tract of land in China has been or shall hereafter be granted by the government of China to the United States or their citizens for purposes of trade or commerce, that grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within said tracts of land, except so far as that right may have been expressly relinquished by treaty."[14]

In practice, however, under extraterritoriality China has found it impossible to exercise jurisdiction in respect to such arrangements, and foreign powers have sometimes taken advantage of this fact to imply jurisdictional powers from the terms

[13] Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 284ff.; Eagleton, *The Responsibility of States in International Law*, pp. 160ff.; Sir John Fischer Williams, "International Law and International Financial Obligations Arising from Contract," *Bibliotheca Visseriana*, II (1923), 3, 28, 59; "Draft Code on Responsibility of States," Prepared by Research in International Law, *Am. Journ. Int. Law, Spec. Supp.*, April 1929, Vol. 23, pp. 167ff.; G. Kaeckenbeeck, "The Protection of Vested Rights in International Law," *Br. Y. B. Int. Law*, 1936, pp. 2ff.; Q. Wright, "The End of a Period of Transition," *Am. Journ. Int. Law*, Oct. 1937, vol. 31, 609ff.

[14] Malloy, *Treaties etc. of the United States*, Vol. 1, p. 23.

of such instruments.[15] Confronted by the alternative of resort to extraterritorial courts or to diplomatic discussion, China has naturally chosen the latter when disagreements arose, with the result that often an arrangement, originally concluded with a foreign corporation, has subsequently been defined by and merged in a diplomatic agreement or even a formal treaty with the corporation's state.[16]

If extraterritoriality were abolished, private law contracts, concessions and leases would cease to have an international law character and, where executable in China, would be interpreted by Chinese law in Chinese courts, and the normal Chinese jurisdiction would be exercisable in the areas covered by them unless it had been expressly given up.[17] While the principle is easy to state in the abstract, in view of the history of Chinese transactions under extraterritoriality, exceptional difficulties are presented by an effort at the present moment to disentangle Chinese international and municipal contractural obligations. It may be that some agreements made by China with foreign corporations are to be considered genuine international agreements because the foreign corporation was originally acting as an agent of a foreign government or because its agreement had subsequently been merged in a true international agreement. A state doubtless can act through such agents as it sees fit, and if the other contracting party knows the real party in interest, the form of the document may not be conclusive.[18] Furthermore, a municipal obligation by express recognition in a treaty may become an international obligation.[19]

On the other hand, it may be that some agreements made by

[15] Russia, for instance, inferred the right to police and exercise general jurisdiction in the zone of the Chinese Eastern Railway from a clause in the contract between China and the Russo-Asiatic Bank providing that "the Company [Chinese Eastern Railway Company] will have the absolute and exclusive right of administration of its lands." (MacMurray, *op. cit.*, Vol. 1, p. 76; Blakeslee, *The Pacific Area,* World Peace Foundation, 1929, p. 108.) The United States, Great Britain and China all objected to this interpretation. (See Harold Parlett, *A Brief Account of Diplomatic Events in Manchuria,* Royal Institute of International Affairs, London, 1929, p. 28.)

[16] This has been true of the Chinese Eastern Railway, which was regulated by the Sino-Russian Treaty of 1924, prior to its transfer to Japan, though the initial agreements in regard to it were between China and the Russo-Asiatic Bank.

[17] *Supra,* note 14.

[18] *Supra,* note 15.

[19] *Supra,* note 16, and Lindley, *The Acquisition and Government of Backward Territory in International Law,* London, 1926, p. 286.

foreign governments with China should properly be regarded as municipal law instruments on the theory that in making them the foreign government was not acting as a state but as a private entrepreneur entering into business in a foreign country and submitting itself to that state's jurisdiction. Whether a state can do that is not entirely clear, though there is a tendency to recognize that sovereign immunities do not exist with respect to real estate, personal property, and vessels used wholly for trade which the sovereign owns in foreign territory.[20] Eminent jurists have pointed out that financial agreements between two states often resemble very closely those between a state and a foreign corporation in form and effect.[21] The Supreme Court of the United States has discovered not only "treaties, alliances and confederations" which the states of the union cannot make at all, and "compacts and agreements" which they cannot make without the consent of Congress, but also agreements for the purchase of land, for the transit of exhibitions, for the removal of sources of disease, and purely business contracts "not tending to increase of political power in the states" which they can make without Congressional consent.[22] Such agreements would seem to be in the realm of municipal rather than of international law.

But while it may be difficult to isolate the Chinese contract obligations to foreign nationals and corporations and perhaps to foreign governments, which are properly to be considered of a municipal law character, it seems clear that some Chinese agreements are of that type and that foreign jurisdiction based upon them would be profoundly affected by the abolition of extraterritoriality. If such instruments would become in law

[20] C. C. Hyde, *International Law*, Vol. 1, pp. 444-8. Marshall, C. J., in Schooner Exchange vs. MacFaddon, 7 Cranch, 116, 145, said: "A Prince by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the Prince and assuming the character of a private individual." See also draft convention on competence of courts in regard to Foreign States. Arts. 8d, 9-13 (Research in International Law), *Am. Journal Int. Law, Special Supplement*, July 1932, pp. 560-9, 572-646.

[21] Sir John Fischer Williams, *op. cit.*, Vol. 2, pp. 58-9. He recognizes "A wide—if mainly technical—distinction" in that a contract between state and state is "an engagement within the sphere of international law" (p. 3), but he can see no good reason for "applying different measures in the enforcement of the borrower's obligations" (p. 59).

[22] Virginia vs. Tennessee, 148 U. S. 503; South Dakota vs. North Carolina, 192 U. S. 286 (1904); Q. Wright, *Control of American Foreign Relations*, pp. 231-3.

subject to interpretation and application by Chinese courts, apparent grants of jurisdiction in derogation of Chinese sovereignty would be restrictively construed, and diplomatic interposition would become improper until local remedies had been exhausted.

Insofar as the actual situation arises from the attribution of political significance to instruments which, under international law, should have a merely economic significance, the *de facto* situation does not accord with the *de jure* situation.

The uncertainty as to the agreements respecting China upon which various states might rely was to some extent eliminated by one of the resolutions of the Washington Conference which required the powers, other than China, to file with the Secretariat of the Conference for transmission to the participating powers "a list of all treaties, conventions, exchanges of notes or other international agreements which they may have with China or with any other Power or Powers in relation to China, which they deem to be still in force and upon which they may desire to rely," and also "a list, as nearly complete as may be possible, of all those contracts between their nationals, of the one part, and the Chinese Government or any of its administrative subdivisions or local authorities, of the other part, which involve any concession, franchise, option, or preference with respect to railway construction, mining, forestry, navigation, river conservancy, harbor works, reclamation, electrical communications, or other public works or public services, or for the sale of arms or ammunition, or which involve a lien upon any of the public revenues or properties of the Chinese Government or of any of its administrative subdivisions." Texts of such treaties and contracts, or citations to available sources, were to be provided and future treaties and contracts of the type were to be notified to the parties within sixty days of conclusion. The Chinese Government also agreed to notify all such treaties and contracts, past or future, concluded by it or by any local authority with any foreign power or its nationals whether a party to the resolution or not.[23]

[23] Willoughby stated in 1927 that, so far as he could learn, lists in conformity with this resolution had been deposited only by the United States, Great Britain, Netherlands, Italy, France, Portugal and the text of a treaty by China. *Op. cit.*, Vol. 1, pp. 20-3. The existence of this commitment probably contributed to Japan's willingness in 1923 to terminate the Lansing-Ishii agreement of 1917. The Nine Power Treaty of the Washington Conference declared it the firm in-

(4) The most serious source of disharmony between the *de facto* and *de jure* situation in the Far East lies, however, in the acts of certain states which, though found by appropriate international procedures to be contrary to international law, and though protested by other states, have nevertheless resulted in *de facto* conditions contrary to the rights of other states. The most important instances of this kind have arisen from the Japanese hostilities in Manchuria in 1931 and in China generally in 1937, resulting in the creation of the Japanese puppet state of "Manchukuo" and the Japanese occupation of large areas of China south of the Wall, within which puppet governments have been set up.

Hostilities have occurred before, both in the Far East and elsewhere, but ordinarily the disharmony between the *de facto* and *de jure* situation which results from such hostilities has been soon removed by the general recognition of the *de facto* situation, thus giving it a *de jure* status. The wide acceptance of anti-war treaties and of the non-recognition doctrine as a deduction from and sanction to such treaties, has hampered the application of this method for restoring harmony between facts and rights in a way satisfactory to the aggressor, while the solidarity of the powers, whose rights have been ignored, and their willingness to apply effective sanctions have not been sufficient to restore the legal situation and thus to re-establish harmony be-

tention of the powers "to refrain from taking advantage of the present conditions in order to seek special rights or privileges which would abridge the rights of the subjects or citizens of friendly states. . . ." Secretary Lansing's memoirs published in 1935 disclosed that this wording came from a condition which he had insisted should be attached to the Lansing-Ishii agreement, but which was not to be published. The fact that the resolution concerning publicity of agreements, accepted by Japan in 1922, would have required the United States to publish this condition, may have accounted for Japan's willingness in 1923 to agree that the Lansing-Ishii notes were to be regarded "as cancelled and of no further force or effect." (See W. W. Willoughby, *American Journal of International Law*, July 1938, Vol. 32, pp. 639-40.) Japan's reluctance to have this condition published may be explained by the interpretation which she seems to have wished other powers to attach to the Lansing-Ishii agreement. This agreement, though recognizing China's "sovereignty" and "territorial integrity" referred to Japan's "territorial propinquity" and "special interests" in China. It was first notified to China by the Japanese legation in Peking before the time agreed upon for its publication, and before the United States had notified its Minister in Peking, in a Chinese text using characters for the words "special interests" which carried a political connotation. (Willoughby, *Foreign Rights and Interests in China*, Vol. 1, pp. 360-75. See also Tatsuji Takeuchi, *War and Diplomacy in the Japanese Empire*, New York, 1935, p. 202.)

tween facts and rights in a way satisfactory to the victims of aggression.

In other cases where foreign privileges in China have grown up without basis either in recognized principles of international law or in valid international agreements to which China is a party, there has been a partial restoration of the *de jure* situation, particularly where the privilege has grown by gradual encroachment rather than by sudden military action. If acquiesced in by China for a considerable period of time, such practices might eventuate in legal claims, but China in fact has not acquiesced.[24] In China there appear to be no foreign privileges based on long custom, as there doubtless were in Turkey.[25] All privileges not flowing from general international law rest on the consent of China, expressed by an appropriate organ, central or local, and the instruments recording this consent are therefore to be deemed the foundations of new rights, not the recognition of old ones.[26] These practices, which have included such things as the refusal of foreigners to pay certain taxes, the maintenance by foreign governments of post offices, radio stations, police boxes and military forces in certain places, and the assumption by certain foreign governments of spheres of interest or regional understandings in parts of China, have been in some measure eliminated under the stimulus of several resolutions passed at the Washington Conference.[27]

[24] As an illustration of its alertness may be noted its prompt declaration, after learning of the Lansing-Ishii agreement of November 1917, that it "would not allow itself to be bound by any agreement entered into by other nations." (Willoughby, *Foreign Rights and Interests in China*, Vol. 1, p. 363.)

[25] Though grants of extraterritoriality were made to Arab traders as early as the 9th Century. Quigley, *Am. Journ. Int. Law*, Jan. 1926, Vol. 20, p. 48.

[26] Willoughby, *op. cit.*, Vol. 2, p. 557.

[27] *Ibid.*, Vol. 1, p. 356; Vol. 2, pp. 598, 872, 888, 975. The *de facto* status of foreign concessions and settlements in China is still determined by local practice and political actions rather than by legal documents. J. Escarra, "Le Régime des Concessions Étrangères en Chine," Académie de droit international, *Recueil des Cours*, 1929, II, Vol. 27, p. 12.

CHAPTER II

SOURCES OF INTERNATIONAL LAW

The modern system of international law grew up in Europe in the late Middle Ages and Renaissance period under the dual influence of theory and practice.[1] The practice was that of merchants seeking profit in maritime trade and of kings seeking power at the expense of the feudal nobility below, of the pope and emperor above, and of their brother monarchs on the side. The merchants established consulates, or induced the city or state to which they belonged to do so, at ports in which they traded, especially those in the Levant, to adjudicate their disputes. From this practice there developed codes of maritime and commercial law applicable in peace and war, based in part on ancient conceptions and customs, tending to the assumption of freedom of the seas for mercantile enterprise.

The kings established the idea of territorial sovereignty as a bar to feudal claims by nobility, emperor or papacy in the land they wished to control. The claims of territorial sovereignty also served as the basis for relations with other kings, though these relations necessarily involved exchanges of diplomatic officers and recognitions of diplomatic immunities qualifying territorial sovereignty. Conflicting claims in regard to boundaries and territories led to wars, royal marriages, diplomatic negotiations, treaty making, mediation and arbitration as means both of expanding territory and of settling conflicts.

From these practices grew foreign offices and archives, the latter containing the texts of maritime codes, admiralty and prize adjudications, decrees imposing maritime restraints in time of war, military and naval orders and regulations, diplomatic correspondence, arbitral awards and treaties. After this material

[1] See Van Vollenhoven, *The Law of Peace;* Walker, *History of International Law;* Butler and Maccoby, *The Development of International Law;* J. Goebel, *Equality of States,* N. Y., 1923; E. R. Adair, *The Extraterritoriality of Ambassadors in the 16th, 17th and 18th Centuries,* N. Y., 1929; T. E. Holland, *Lectures on International Law,* London, 1933, pp. 9-33; Oppenheim, *International Law,* 5th ed. (Lauterpacht), Chap. 2; George A. Finch, *The Sources of Modern International Law,* Washington, Carnegie Endowment, 1937, Chap. 1.

began to be published in the sixteenth and seventeenth centuries the influence of precedent set in and writers began to systematize this body of material under general principles.

In doing this they were influenced by their learning in the Roman law, especially that part dealing with the acquisition of property and the interpretation of contracts, and by the theory of natural law which attributed equality and certain inalienable rights to men in "a state of nature."[2] Sovereigns subject to no superior earthly power appeared to be in this situation in relation to each other and thus tended to be regarded as equals in legal power and dignity, and equally entitled to respect for their "natural" rights, to jurisdiction over their lands, subjects, and governmental agencies, and to respect for their rights acquired by treaty or other legal means. This theory ran counter to the hierarchical order unified by the universal authority of pope or emperor, which, during the Middle Ages, was generally accepted in theory if not in practice. It, however, fitted well to the territorial ordering of state relations established by the Treaties of Westphalia in 1648 which ended the Thirty Years' War, recognized the territorial jurisdiction of the states of the empire, the independence of the Netherlands and Switzerland, and the subordination of religious unity to territorial sovereignty.

Francis of Victoria, Albericus Gentili, Hugo Grotius, Samuel Pufendorf, in the sixteenth and seventeenth centuries, utilizing the medieval writings on just war, the Roman law and the law of nature, wove theory and practice into a consistent body of doctrine based on the mutual obligation of sovereigns to treat each other as equals, to respect each other's territory, nationals, ships, ambassadors and governments, to observe restraint in initiating and conducting war, to follow established forms in diplomacy and treaty making, and to carry out validly made treaties in good faith.[3]

This highly artificial system grew up in a particular historical situation and was frequently called the law of the Christian States of Europe. Its relation to the law of nature and its more common denomination as the law of nations gave it, however, from the first a universal aspect; in fact the first text writer,

[2] E. D. Dickinson, *Equality of States in International Law.*

[3] See Inter-American Treaty on Rights and Duties of States, December 26, 1933, *U. S. Treaty Series,* No. 881.

Victoria, was led to his discussion by considering the relation of the Indians of Mexico to the Spanish invaders. He insisted that the former, though neither Christian nor European, were entitled to the benefits of the law of nations.[4]

While precise dating is difficult, in a rough way it can be said that the modern system of international law spread from Europe to the Christian but non-European nations of the American hemisphere from 1780 to 1840, and that in the next half-century it spread in a measure to the non-Christian and non-European nations of the Orient. Even more recently a few African nations, Ethiopia, Liberia and Egypt, have been admitted to the Family of Nations, thus making the original family of European Christian nations a practically world-wide Family of Nations whose members have the widest variety of cultural backgrounds.

In view of the late date at which the Oriental nations were admitted into the Family of Nations and the lack of firm rooting in their own traditions of the salient principles of this system, it is not surprising that they have found some difficulty in accommodating their behavior to the processes of international law.[5] It is true that in theory the rules and procedures of this law are based on common consent of all nations, the Oriental no less than the Occidental, but in fact the system is the outgrowth of European culture, and in many respects is alien to the natural tendencies of Oriental thought, particularly in the emphasis it places upon the arbitration or findings of disinterested third parties controlled by general principles, as the evidence of justice. The Orientals tend rather to envisage justice as a compromise negotiated by the interested parties.[6]

[4] Much of the remainder of this section is taken from the author's *Diplomatic Machinery in the Pacific Area*, Inst. of Pacific Relations, 1936, pp. 9ff. As recently as 1859 British law officers advised that international law "now subsists by the common consent of Christian Nations." Quoted by H. A. Smith (*Great Britain and the Law of Nations*, London, 1932, Vol. 1, p. 12) who, however, concludes "If a state possesses a degree of civilization and stability sufficient to enable it to maintain normal relations with other states, then those relations will be regulated by the general body of international law. Whether the culture of such countries be Christian or non-Christian, European or Oriental, would appear irrelevant." (*Ibid.*, p. 18.) See also Oppenheim, *op. cit.*, Vol. 1, pp. 43ff.; Holland, *op. cit.*, pp. 37-40; and Chapter IV *infra*.

[5] See "Statement of a Japanese," *Problems of the Pacific, 1927*, p. 167, and *1929*, p. 235. The repudiation of basic principles of international law by certain European states is due to recent revolution rather than to original non-assimilation and thus may in the long run present a less serious problem.

[6] Lin Yutang, *My Country and My People*, N. Y., 1935, pp. 81, 196, 203. Although China had arbitration agreements in the period of feudalism (600 B.C.).

The difficulties of adjustment become apparent if one considers the history of the admission of the Far Eastern nations to this system. Three periods can be distinguished. The first, before 1842, was one in which the two systems were officially isolated. While European trade and missionary activity were penetrating to the Far East, while an occasional diplomatic mission was sent by Western countries to China or Japan, and while Russia even made treaties (1689, 1727, 1768, 1792) with China during this period, there was no regular official intercourse. The Japanese in fact, after deep draughts of Western trade and religion in the late sixteenth and early seventeenth centuries, responded by prohibiting such intercourse (except for a single Dutch ship each year) entirely and living as a hermit nation for two centuries.

The next period may be said to have opened with 1842, the date of the first British treaty with China, although even earlier (in 1826 and 1833) Great Britain and the United States had made treaties with Siam. The Treaty of Nanking, however, marks the beginning of regular official relations of the leading Occidental trading powers with China, and in a little over ten years this was followed by the inauguration of similar relations by these powers with Japan. This period which ended with the Sino-Japanese War of 1895 might be called the diplomatic period in which, although regular diplomatic relations were established between Occidental and Far Eastern nations, these relations were based not on general principles of international law, but on treaties which gave the Western nations privileges in the Far East which they did not accord to each other. The period was characterized by the tendency of the Western nations to act in concert in Far Eastern affairs. The Eastern nations had in the main tried to remain in isolation. Japan, it is true, embarked upon a different course after 1867, but according to MacMurray:

> The whole purpose of Chinese statesmanship, in relation to the outer world, had been to maintain the traditional isolation of the country; and against that aloofness the foreign nations have struggled to establish the right of free intercourse. The results of that struggle, as embodied in the earlier treaties, may be roughly summarized under three headings, namely: extraterritoriality, or the rights of foreigners to be exempt from the processes of Chinese law and amenable only to the jurisdiction of their national tribunals; the right of residence in designated places, and of access to the interior of the country; and the right to trade freely, unhampered by monopolies, subject to a fixed tariff of import and export duties, and

with the privilege of commuting by a single fixed charge all local taxes and levies upon commerce.[7]

The final period has witnessed the practically complete admission of the Far Eastern nations to the European system on equal terms. During this period, it is true, Korea, which had been generally recognized as independent, was annexed by Japan.[8] Japan and Siam have been relieved of the burden of extraterritoriality and China has made important steps in that direction, although as the result of a tumultuous historical process not yet completed.

The conditions (writes MacMurray)—particularly the financial requirements—incidental to the war with Japan (of 1895) compelled a readjustment of China's attitude toward foreign nations and toward their resources and their influences. The Chinese nation found itself perforce face to face with the world, and under the necessity of accommodating itself to a relationship with it. Thenceforward, the problem of China was to avail itself of the material resources and experience of the West, while retaining what was vital in its own institutions and preserving as best it could not merely the integrity of its territories, but its political and national entity. How clearly this problem of assimilating the new conditions to the old

[7] P. xiii.

[8] Korea is said to have entered into relations with China as early as 1122 B.C. and Japan is said to have invaded it as early as 200 A.D. Buddhism entered Korea in the 4th Century A.D. from whence it passed to Japan in the 6th Century. Both China and Japan at times claimed tribute of Korea, and in 1594 Hideyoshi, failing to obtain free passage through Korea to attack China, unsuccessfully attacked Korea. The Manchus conquered Korea in 1637 and after their conquest of China in 1644 Korea remained a vassal. Catholic missionaries entered Korea in 1794. A French naval expedition was unsuccessful in an attempt to annex the country in 1866. American naval visits were made soon after, that of 1871 resulting in hostilities. Japan manifested hostile intentions toward Korea in 1873 and made a treaty in 1876. To offset Japanese influence, China encouraged American negotiation of a treaty with Korea in 1882. England, Germany, Italy, Russia and France made treaties with Korea in the next four years on the assumption that Korea was no longer under Chinese suzerainty. Japanese victory over China in 1895 established Korean independence for the moment, and Korea was permitted to adhere to the conventions of the Hague Peace Conference of 1899. Russian penetration into Korea began, but as a result of its victory over Russia in 1905 Japan established a protectorate over Korea. During this war the United States had by agreement acquiesced in the Japanese intention to establish a protectorate over Korea in return for Japan's assurance that it entertained no aggressive designs on the Philippines. Japan successfully objected to the reception of the Korean mission sent to attend the Hague Conference of 1907, and in 1910 annexed the country by a treaty signed on August 22, 1910, by which the emperor of Korea was permitted to enjoy a personal status and to occupy his palace in Seoul. The powers seem to have acquiesced in the extinction of Korea as a member of the Family of Nations and to recognize that its territory is now a possession of Japan. (See H. B. Morse and H. F. MacNair, *Far Eastern International Relations*, Boston, 1931, pp. 32-6, 382-400, 500-9, 517-29.)

and of adapting the old ideas to the new has been realized by those responsible for the destinies of the country—how widely, how courageously, and how disinterestedly they have acted in seeking solutions of the problem—how well and how loyally they have been served by the various foreign interests to which they have from time to time turned for assistance and co-operation—those are speculations in regard to which some indications may be found in the data here gathered together, but for which no categorical answers are possible. There have been times of progress and of reaction; there has been confusion of purposes; there has been blind Utopianism, and bitter disillusionment; but the process of association of foreign with Chinese interests has gone on almost without interruption or pause, China repeatedly seeking foreign assistance in the solution of its problems of industrial, economic, and administrative development, and giving in return rights which carried with them, in many instances at least, an implication of political interest.[9]

China, as well as Japan and Siam, participated in the Hague Conferences of 1899 and 1907. They have all become parties to many of the public international unions, they were all belligerents in the World War and original members of the League of Nations. Japan, after its victories over China in 1895 and over Russia ten years later, was recognized as one of the great powers of the world.

This period was characterized by the evolution of a balance of power in the Far East itself, particularly in the relations of Japan, Russia and China; the entry of the various Occidental nations in the different sides of this balance; and consequently a reduction of the tendency of the Occidental nations to unite in any crisis concerning a particular Oriental nation. In one matter, however, that of immigration, discrimination by the Occident against the Orient still existed, especially in the United States and the British Dominions. The representatives of these countries were influential in preventing a declaration respecting racial equality, proposed by Japan, from being inserted in the League of Nations Covenant in 1919. By 1930, however, it appeared that formal if not practical discriminations on this subject might be eliminated, that the extraterritoriality which remained in China was presently to go, and that the Oriental nations would be wholly equal participants in a world system of international law and organization.

The upsetting of the Far Eastern balance of power—already disturbed by the World War and the revolutions in China and Russia—through the military aggressions of Japan, the rise of

[9] *Ibid.*, pp. xiii, xiv.

European dictatorships, the weakening of the League of Nations, the formation of the "anti-Communist" pact between Germany, Italy and Japan, the inconsistent Russo-German agreement of 1939, and the outbreak of the second World War renders these developments more doubtful today. The legal situation remains where it was, but numerous *de facto* changes have occurred, and the general confidence in the possibilities of a world ordered through effective enforcement of international law has been shaken. We may, however, indulge in the optimism which Elihu Root supported with hope in 1915,[10] with argument in 1917,[11] and with conviction in 1921.

On the last date, with the war over, but the United States not a member of the League of Nations, he wrote:[12]

> The process which owes its impulse toward systematic development to Grotius and the horrors of the Thirty Years' War cannot be abandoned. Never before was the need so great. The multitudes of citizens who now control the national governments of modern democracies and direct international policies cannot safely follow the passion of the moment or the idiosyncrasy of the individual public officer in their international affairs, without accepted principles and rules of action, without declared standards of conduct, without definition of rights, without prescription of duties too clear to be ignored. Otherwise the world reverts to chaos and savagery. . . . The only mode of meeting this great and vital need dictated by reason and approved by experience, is the establishment of institutions through which, when strife is not flagrant, the deliberate and unbiased opinion of mankind may declare and agree upon the rules of conduct which we call law, by which in times of excitement judgment may be guided, and by which the people may be informed of the limits of their rights and the demands of their duties; and by the establishment of institutions through which disputed facts may be determined and false appearance and misinformation may be stripped away and the truth be made known to the good and peaceful peoples of the world by the judgment of impartial and respected tribunals. In such institutions rests the possibility of growth and development for civilization. Through them may be established by usage the habit of respecting law.

It is today assumed by the great majority of governments,[13]

[10] *Proc. Am. Soc. Int. Law, 1915,* "The Outlook for International Law," p. 10.
[11] *Ibid., 1917,* "The Effect of Democracy on International Law," pp. 5, 8.
[12] *Ibid., 1921,* "Opening Address," pp. 5, 6, 13.
[13] Secretary of State Hull's statement of July 16, 1937, asserting among other things, "We believe in respect by all nations for the rights of others and performance by all nations of established obligations. We stand for revitalizing and strengthening international law," was accepted by sixty governments. See *Fundamental Principles of International Policy,* U. S. Dept. of State Publication No. 1079.

courts[14] and jurists[15] of Western states that there is a Family of Nations and that its members are bound by international law as established by custom, as accepted by convention, as deduced from general principles and as expounded by courts and jurists. These four sources of international law have been expressly accepted by the great majority of states in accepting the statute of the Permanent Court of International Justice, Article 38 of which provides:

> The Court shall apply: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; (4) subject to the provisions of Article 59,[16] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means to a determination of rules of law.

The same sources provide material for determining who are the members of the Family of Nations subject to international law, but there is difference of opinion whether such status follows only from the expressed consent of existing members suggested by the first source, or may follow from the tacit or presumed consent suggested by the remaining sources. The latter theory holds that a political community by the fact of governing

[14] "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." Justice Grey, in the Paquete Habana, 175 U. S. 677.

[15] "Violations of this law are certainly frequent, especially during war. But the offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts. Has a State ever confessed that it was going to break the Law of Nations or that it ever did so? The fact is that States, in breaking the Law of Nations, never deny its existence, but recognize its existence through the endeavor to interpret the Law of Nations in a way favorable to their act." (Oppenheim, *International Law*, 3rd ed., Vol. 1, Sec. 10, p. 13.) "It is clearly emphasized (in certain opinions of British Law Officers) that international law as a whole is binding upon all civilized states irrespective of their individual consent, and that no state can by its own act release itself from the obligation either of the general law or of any well-established rule. At the same time it is equally clear that the existence of any particular rule of law which may be in dispute is a question of fact to be proved by the evidence of practice. In other words, consent is the legislative process of international law, though it is not the source of legal obligation. A rule once established by consent (which need not be universal) is binding because it has become a part of the general law, and it can then no longer be repudiated by the action of individual states." (H. A. Smith, *Great Britain and the Law of Nations*, Vol. 1, pp. 12-13.)

[16] This article provides: "The decision of the court has no binding force except between the parties and in respect of that particular case."

itself and submitting to the superior authority of no other government is a sovereign state and member of the Family of Nations. Francis of Victoria assumed on this theory that the Aztec empire of Montezuma was a member of the Community of Nations even before it was visited by Cortez and that consequently it was entitled to the general rights and privileges of international law as against the latter's encroachments.[17] According to this theory, China and Japan would have been members of the Family of Nations before they entered into regular relations with Western powers. This theory encounters the difficulty in principle that communities should not be bound by a law which they never heard of,[18] and the difficulty in practice that the Western states did not at first apply the rules of international law, which they acknowledged among themselves, to the communities of different civilization which they encountered in America, Asia and Africa. Sometimes they claimed title to those areas on the principle of discovery and occupation, as though the area were uninhabited "*territorium nullius*,"[19] and sometimes they established by treaty special relations with the natives, different from those recognized among European states.[20]

Because of these difficulties most governments, courts and jurists assumed that a state, whether it had long existed in fact, like Turkey, or had recently become a *de facto* state through successful revolution, like the United States, could not become a member of the Family of Nations and a state *de jure* except through admission to that circle by the states already in it.[21]

[17] *De Indis et de jure Belli, Relectiones*, Washington, Carnegie Endowment for International Peace, 1917. These and other writings of Victoria are printed also in J. B. Scott, *The Spanish Origins of International Law*, Vol. 1, Oxford, 1934.

[18] "It has been argued that it would be extremely hard on persons residing in the Kingdom of Morocco, if they should be held bound by all the rules of the Law of Nations, as it is practised amongst European states.***It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observance." The Hurtige Hane, 3 C. Rob. 324; 165 E.R. 480. See also the Helena, 4 C. Rob. 5; 165 E.R. 572 (1801), and H. A. Smith, *op. cit.*, p. 15.

[19] Johnson vs. Mackintosh, 8 Wheat. 543 (1823); Seeley, *Expansion of England*, p. 44; Lindley, *Acquisition and Government of Backward Territory in International Law*, p. 328; Wright, *Mandates under the League of Nations*, 1930, p. 7.

[20] H. A. Smith, *op. cit.*, pp. 14ff.; Lindley, *op. cit.*, pp. 24ff.

[21] Oppenheim, *op. cit.*, Vol. 1, Chap. 1, Part 5, secs. 26-9; Holland, *op. cit.*, p. 89.

This process of admission thus involved a reciprocal commitment whereby on the one hand a *de facto* state manifested a desire to become a member and a willingness to accept the duties and responsibilities as well as the rights and powers of membership, and on the other hand, the existing members accorded general recognition to that *de facto* state as a *de jure* state and a member of the Family of Nations. The process of establishing these commitments has not been reduced to a formal procedure. It is usually assumed that a new state upon coming into contact with the existing members of the Family of Nations wishes to become a member, entitling it to equal treatment, even if it does not expressly so declare. In some cases, however, states upon acquiring *de facto* independence have, as did the United States, by formal resolution asserted their willingness to accept the burdens of international law in their plea for recognition.[22] It has been very uncommon for *de facto* states or governments expressly to deny obligations under general international law as did the Soviet Union in its early days.[23]

It is also usually assumed that a state which has in fact acquired independence by successful revolt from a state member of the Family of Nations is sufficiently recognized to be admitted to the Family when it has been formally recognized by the parent state,[24] though this principle may have been modified through the general acceptance of the Stimson doctrine. Under that doctrine it could not be assumed, for example, that "Man-

[22] Congress resolved on May 22, 1779, that the United States will cause the "law of nations to be most strictly observed." (*Journal of Cong.*, Ford ed., Vol. 14, p. 635. See also resolutions, Aug. 2, 1779, Nov. 23, 1781, Dec. 4, 1781, *ibid.*, Vol. 14, p. 914; Vol. 21, pp. 1137, 1158; and Q. Wright, *The Enforcement of International Law through Municipal Law in the United States*, 1916, p. 221.)

[23] Lenin taught that "international law as practised by capitalist states in their relations among themselves is directed towards a consolidation of the ruling position of capital." To such a law the Communists were opposed but as relations between Soviet Russia and other states "developed on a normal basis, formulations of international law in a manner acceptable to communist theory have been sought. See J. N. Hazard, "Cleansing Soviet International Law of Anti-Marxist Theories," *Am. Journ. Int. Law*, April 1938, Vol. 32, pp. 246ff. See also T. A. Taracouzio, *The Soviet Union and International Law*, N. Y., 1935; Oppenheim, *op. cit.*, Vol. 1, pp. 50-1.

[24] It was assumed by Great Britain in 1825 that third states should withhold full recognition of a revolutionary community until it had been extended by the parent state. (Canning to Ward in Mexico, Sept. 9, 1825, printed in H. A. Smith, *op. cit.*, Vol. 1, p. 126.)

chukuo" would become a member of the Family of Nations even if it were recognized by China.[25]

In the case of ancient states of non-European civilization, it has not been assumed that they became equal members of the Family of Nations through entering into formal diplomatic or treaty relations with a few states. Recognition of their equality in relations with a large number of existing members has usually been considered necessary.[26] The practice of admitting such states to the Family of Nations by collective action as through invitations to general international conferences or membership in general international organizations, such as the League of Nations, has grown in practice.[27] Iraq, for example, acquired *de jure* statehood through admission to the League of Nations,[28] and Turkey probably acquired this status through its formal admission to "the public law and the concert of Europe" by Article VII of the Treaty of Paris of 1856.[29]

It is to be noted that a state which has been admitted as a full member of the Family of Nations may have accepted certain limitations upon its normal powers by treaty, as did Switzerland by accepting neutralization and Poland by accepting special obligations to protect minorities. Such treaties are, however, to be narrowly construed. Such a state is presumed to be an equal member of the Family of Nations except in so far as treaties expressly limit its powers.[30] Such states are to be distinguished from states, like the Barbary states, the American Indian tribes or the Princes of East India, not admitted as equal members of the Family of Nations, but in treaty relations with a few states. Such states are presumed to have no rights or duties at all under international law except insofar as the treaty expressly grants them.[31]

It is believed that evidence of the kind suggested in this chap-

[25] *Supra*, Introduction, notes 1-3.

[26] Rivier, *Principles du droit des gens*, Vol. 1, pp. 57-61; Moore, *Digest of International Law*, Vol. 1, p. 74.

[27] Malbone W. Graham, "The League of Nations and the Recognition of States," *Publications of the University of California at Los Angeles, in Social Sciences*, Vol. 3, No. 1, p. 41.

[28] Q. Wright, "Proposed Termination of the Iraq Mandate," *Am. Journ. Int. Law*, July 1931, Vol. 25, pp. 436ff.; Philip W. Ireland, *Iraq, a Study in Political Development*, New York, 1938, p. 418.

[29] But see H. A. Smith, *op. cit.*, Vol. 1, p. 16.

[30] Rivier, *loc. cit.*

[31] H. A. Smith, *op. cit.*, pp. 30, 39ff.

ter, to be further elaborated in Chapter IV of this study, is sufficient to warrant the conclusion that China, Japan, and Siam have been admitted to the Family of Nations and consequently that the entire body of international law applies to their relations both *inter se* and with Western powers. Any derogation from the application of general international law must rest upon treaties, custom, or other sources recognized by the general law itself. Further evidence on this point will be set forth in the following chapters.

CHAPTER III

STATUS OF FAR EASTERN TERRITORIES

Assuming that the Far East today lies within the area subject to general international law, the first problem in stating its legal situation is to examine the status of the territories in that area. Modern international law rests upon the principle of territorial sovereignty.[1]

The international lawyer thinks of the world as composed of sixty-odd states, members of the Family of Nations, each of which occupies a territory within which it is sovereign in the sense of having the legal capacity to organize and exercise authority as it sees fit and of being alone responsible to other states for whatever happens in that territory. The rights and duties of all persons and officials within the territory are governed by the state's internal law alone and the state is responsible under international law alone.

He thus recognizes a sharp distinction between internal or municipal law which governs individuals and organs of government and which each state can change at will, and international law which governs states, and cannot be changed except by the express or tacit consent of all those bound.

This simple picture is of course modified by the habits of travel, trade, diplomacy, and war which bring citizens and officials of one state into the territory of another with the result that international rights, privileges, and immunities for the benefit of such persons have grown up by treaty and practice, subtracting somewhat from the completeness with which states can exercise their sovereignty in their territory. In such cases, however, the observance and enforcement of these rights belong primarily to the territorial sovereign and are sanctioned only by that state's international responsibility, which, because of the presence of such persons within its borders, is somewhat increased.

Sometimes this responsibility has been even further increased by the undertaking of states to perform acts, enact laws, or pursue policies in their territories such as disarming, dredging rivers, extraditing criminals, establishing labor standards, or respecting minority rights; but still the doing of these things is left to the state within whose territory they are to be done acting through its own agencies. It alone is sovereign in its territory, and all territory is under the sovereignty of some state. This in broad outlines is the international lawyer's conception. He may admit that there are exceptions like extraterritorial jurisdiction, protectorates, leases, servitudes,

[1] The quoted paragraphs are from the author's *Mandates Under the League of Nations*, Chicago, 1930, pp. 267-8.

condominiums, but he is likely to look upon them as anomalies, as blemishes in the picture, to be removed as society approaches the ideal.

This ideal is based not merely on conservatism and taste. It is useful to have somewhere some authority with plenary power to act in the presence of novel conditions unprovided for by any legal document or precedent. Sovereignty is the medium whereby law is kept *en rapport* with changing conditions. Since the inadequacy of communications, the insufficiency of recorded data, and the meagre understanding of human behavior in the varied conditions of climate, race, and culture have made a single sovereignty of the world impracticable, division has been necessary. Theoretically this division might be defined in terms of persons or activities as well as areas, but in settled societies geography has proved the most natural basis for human grouping. Practically it is difficult to maintain order without exclusive control of an area. Jurisdictional lines between persons and activities in the same area are less precise than geographical boundaries. Authorities far removed from a locality are not likely to understand its changing conditions.

Thus territorial division has proved the most convenient method for organizing government and avoiding conflict between sovereigns. It is justified not merely by custom but by practical considerations and will doubtless continue as a dominant form of political organization for a long time.[2]

The territories with which we are concerned are those of China and her neighbors. As the Near Eastern question has had to do primarily with the process of change in the Ottoman Empire,[3] so the Far Eastern question has had to do primarily with the process of change in the Chinese Empire. In both cases the process of change was precipitated by the impact of militarily equipped and economically minded Western nations upon a vast political structure whose methods had not kept pace with advancing military and economic techniques.[4]

[2] Lowie finds that the territorial tie, though sometimes dwarfed by the kinship tie among primitive peoples, is never eliminated. (*The Origin of the State*, p. 73.) The theory of territorial sovereignty is discussed by Joseph Story, *Commentaries on the Conflict of Law*, 8th ed., Boston, 1883, pp. 8-9, 21-4; J. W. Burgess, *Political Science and Comparative Constitutional Law*, Boston, 1898, Vol. 1, p. 52; J. W. Salmond, *Jurisprudence*, 2nd ed., London, 1907, p. 99; W. W. Willoughby, *Fundamental Concepts of Public Law*, N. Y., 1924, Chap. XVI; Justice O. W. Holmes, in American Banana Co. vs. United Fruit Co., 213 U. S. 347 (1909); W. E. Hall, *International Law*, 4th ed., London, 1893, pp. 20-1, 45-6; Elihu Root, Address, *Proc. Am. Soc. Int. Law*, 1921; Q. Wright, *Enforcement of International Law through Municipal Law in the United States*, 1916, p. 21.

[3] See W. W. White, *The Process of Change in the Ottoman Empire*, Chicago, 1937.

[4] "Protected in the past by their geographical position, the Chinese have in the latest age failed to realize the significance of the means by which the West has conquered nature and overcome adverse geographical conditions. Some of the effects of these phenomena are to be considered in this work." (H. B. Morse and H. F. MacNair, *Far Eastern International Relations*, Boston, 1931, p. 13.)

At the height of the Manchu Empire in the eighteenth century, China exercised practical sovereignty or had relations of suzerainty or tribute throughout Asia east of Kashmir and the surrounding islands north of the equator, excepting only Japan, India, Siberia, and a few possessions of Spain, Portugal, the Netherlands and England, mostly in the East Indies.

This empire included, besides the eighteen provinces constituting China proper, Manchuria, Mongolia, Sinkiang and Tibet. Surrounding oriental states recognized Chinese overlordship "by the periodic sending of tribute, and by the acceptance of investiture on the accession of each new ruler. Liuchiu sent tribute twice in three years until 1875; Korea once in four years until 1894; Nepal every five years from 1790 to 1882; Burma once in ten years until 1895; Laos once in ten years, Sulu once in five years; and Siam once in three years until 1882. Annam had been conquered, and the suzerainty of the emperor asserted, at various times from the period of the Han Dynasty. From 1801 until 1884 there is no record that the ruler of Annam failed at any time to request the confirmation of his title or to send tribute quadrennially, except when the way was blocked by rebellion."[5]

As the Manchu Empire weakened in the nineteenth century, China's neighbors, Russia, the British Empire, France and Japan, advanced their frontiers at its expense.[6]

Russia had been limited to the territory west of the Argun and north of the watershed of the Amur by the Treaty of Nerghinsk of 1689. By the Treaty of Kiachta in 1727, the Siberian-Mongolian boundary was fixed south of Lake Baikal. By the Treaty of Argun (May 1858), however, Russia advanced her frontier to the Amur and by the Treaty of Peking, November 14, 1860, acquired the trans-Ussuri area which had been a condominium under the treaty of 1858. By the treaty of September 15, 1879, Russia acquired Ili on the frontier of Sinkiang at Kuldja, but under Chinese military pressure this was revised by the Treaty of St. Petersburg, February 24, 1881, in which some of Ili was restored. In the meantime Russia had been expanding on Sakhalin Island, and by the treaty signed with Japan at St. Petersburg in 1875 the latter gave up all claim to Sakhalin in exchange for Russian renunciation of claims to

[5] *Ibid.*, p. 345.

[6] Further reference to the historical details of this study can be found in Morse and MacNair's excellent and well indexed volume

the Kurile Islands, but by the Treaty of Portsmouth (1905) the southern half of Sakhalin was ceded to Japan. Subsequently Russia sought to expand in Manchuria, Korea and Outer Mongolia, but the Russo-Japanese War and the Bolshevist revolution have resulted in an abandonment of these claims with the exception of a protecting interest in Outer Mongolia, a friendly interest in the republic of Tannu Tuva, located in a valley between western Mongolia and Siberia, and considerable economic penetration of Sinkiang.

Great Britain established protectorates and colonies in North Borneo and the Malay Peninsula during the late eighteenth and nineteenth centuries.[7] As a result of three wars against China's tributary Burma in 1826, 1852 and 1885, Great Britain annexed the latter by proclamation on January 1, 1886, and had the annexation confirmed by a treaty with China on July 24, 1886. The China-Burmese frontier was fixed by a treaty of March 1, 1894, rectified to Great Britain's advantage by the Convention of February 4, 1897, after China had ceded certain territories to France contrary to the terms of the treaty of 1894. Anglo-French treaties of 1896 and 1907 resulted in Siam's relinquishment, by the treaty of March 10, 1909, of four tributary Malay states which became British protectorates. British commercial penetration of Bhutan and Nepal on the frontier between India and Tibet began in the late eighteenth century. Treaties were made with Nepal in 1792, 1801 and 1816. This state assisted Great Britain in the Indian Mutiny of 1857, in the Tibetan campaign of 1904 and in the World War. By a treaty of 1923 the British recognized the independence of Nepal,

[7] Penang was acquired in 1790. Singapore was ceded by the Sultan of Johore in 1819 and Malacca by the Dutch in 1824. The Sultan of Johore placed himself under British protection in 1885 and accepted a British resident in 1914. Siam ceded suzerain rights in the remaining unfederated Malay states in 1909. Perak came under British protection in 1874 and the remaining federated states soon after. Treaties were made with the Sultan of Brunei in 1774 and 1811, and he accepted British protection in 1888 and British administration in 1906. Sir James Brooke, a British subject, acquired Sarawak from the Sultan of Brunei in 1841, and his son, the second Rajah, placed his domain under British protection in 1888. The Island of Labuan was ceded to Great Britain by the Sultan of Brunei in 1847. After being administered by the British North Borneo Company from 1890 to 1905, it was made a crown colony attached to the Straits Settlements. The British North Borneo Company acquired rights in North Borneo from the Sultan of Sulu in 1878 and from the Sultan of Brunei in 1884, 1885 and 1890. It established the "State of North Borneo" which was placed under British protectorate in 1885, and its boundaries with Dutch Borneo were defined by a treaty of June 20, 1891. The governor of Straits Settlements is also governor of Labuan and high commissioner for all of these protectorates.

ending any shadowy claim of China which may have remained. Great Britain fought with Bhutan in 1865, and by a treaty of 1910 Bhutan agreed to accept British advice on foreign affairs. A Chinese protest based upon China's ancient claim of suzerainty was vigorously rejected at this time. Since the Younghusband expedition to Tibet in 1904 and the Chinese confirmation of a treaty ending these hostilities in 1906, Great Britain has exercised an increasing influence in Tibet, although by their treaty of 1907 Great Britain and Russia recognized Chinese suzerainty of Tibet and mutually agreed "to respect the territorial integrity of Tibet and to abstain from all interference in its internal administration" (Article I). They also agreed not to enter into negotiations with Tibet except through the intermediary of the Chinese government, not to send representatives to Lhassa and not to seek economic concessions in Tibet.

France acquired Cochin China as a result of the war made jointly with Spain against Annam in 1858 and ended by the Treaty of Saigon, June 5, 1862. From this foothold, pressure on Annam led to treaties in 1874 and 1883 by which Annam substituted France for China as protector. War with China followed, eventuating in the Treaty of Tientsin, June 9, 1885, by which China relinquished suzerainty of Annam and Tonkin. By a supplemental convention of 1887 the frontiers of Tonkin and China were defined. By subsequent agreements with Great Britain and Siam, France gradually extended her control at the expense of the latter state, whose tributary relations with China had in the meantime disappeared. Laos and Cambodia were acquired from Siam by the treaty of October 3, 1893, and further territories were added to the latter by treaties of 1904 and 1907; in 1941 portions were retroceded to Thailand (Siam). In 1898 France acquired the lease of the Port of Kwangchouwan in Southern China.

Japan began its modern expansion by annexing the Bonin Islands in 1861 and gaining title to the Kuriles from Russia in 1875. The kingdom of Lew Chew (or Liu Chiu) which had long paid tribute to both China and Japan was absorbed by Japan in 1879, a condition recognized by China in 1881. By the Treaty of Shimonoseki, following its successful war against China in 1895, Japan acquired Formosa and the Pescadores Islands, which lie between that large island and the mainland,

and also eliminated Chinese suzerainty over Korea. A joint *démarche* of Russia, France and Germany required Japan to retrocede the Liaotung Peninsula in Manchuria which it had also acquired by the Treaty of Shimonoseki. Ten years later Russian influence in south Manchuria was eliminated by the Treaty of Portsmouth (1905) ending the Russo-Japanese War, and by the same treaty Japan acquired the southern half of Sakhalin Island. The base at the southern tip of the Liaotung Peninsula which Russia had acquired in 1898 was at the same time transferred to Japan by means of a new agreement between Japan and China. Japan established a protectorate over Korea in 1905 and then annexed the country by treaty with Korea in 1910. The Japanese invasions of eastern Siberia after 1918 (originally as a joint enterprise with the United States, France and Great Britain) and Japan's succession to the German lease of Kiaochow and other rights in the Shantung Peninsula by the Treaty of Versailles of 1919 brought no permanent results, since Japan withdrew from both as a result of discussions and a treaty negotiated with China during the Washington Conference. Japan's penetration of Manchuria, however, continued, resulting in its recognition of the state of "Manchukuo" in 1932, after hostilities against China. A treaty of alliance was made with this puppet state. Japan proceeded to the military penetration of Inner Mongolia and North China and to the occupation of large areas of China in new hostilities which began in July 1937. In 1939 Japan occupied Hainan Island and two groups of small islands in the South China Sea claimed by France (Paracel and Spratly). In 1940 it occupied portions of French Indo-China.

Not only was China pressed on the north by Russia, on the west by Britain, on the south by France and on the north and east by Japan, but it was pressed in the center by all the treaty powers, particularly after the first Sino-British war of 1840. Macao, near Canton, had been occupied by Portugal in 1557, though China continued to exercise some jurisdiction there until 1849 and did not recognize Portuguese sovereignty until the treaty of March 26, 1887, then on the condition that Portugal would not alienate it without Chinese consent. Great Britain acquired Hongkong by the Treaty of Nanking in 1842, and the adjacent mainland area of Kowloon in 1860, adding a leased area to the latter in 1898. Residential settlements authorized by

treaty provisions opening certain ports to foreign commerce and residence grew into enclaves virtually exempt from Chinese jurisdiction, especially in the great international settlement of Shanghai. Leased territories were ceded to Germany (Kiaochow), Russia (Port Arthur), Great Britain (Weihaiwei), and France (Kwangchouwan) as naval bases in 1898, after China had been seriously weakened by the Japanese war three years earlier. Exemption of the Peking legation quarter from Chinese jurisdiction and also demilitarization and foreign policing of the access to Peking from the sea was established by the Boxer Protocol of 1901. Extraterritoriality and tariff privileges were accorded to the "treaty powers" on the basis either of express treaties or most favored nation clauses.[8] While some enclaves of foreign jurisdiction in China have been restored, many remain.

As a result of this history, the territorial relations in the Far East have become extraordinarily complex. The ideal of territorial sovereignties, separated by clear boundaries, has suffered many modifications. To define the legal situation more precisely let us consider the Far Eastern territories as those north of the equator between the 75th and 180th meridians east of Greenwich. There are within this area, constituting over one-eighth of the surface of the globe and nearly half of its population, no less than sixty-seven territories with a distinct status under international law. All but three of these are under the sovereignty, suzerainty, protectorate or mandate of nine states, members of the Family of Nations and parties to the Pact of Paris. The remaining territories are under the *de facto* sovereignty of states which have not been generally recognized.

It will be observed that it has not been found possible to ascribe every territory to the sovereignty of a state. The words suzerainty, protectorate and mandate indicate in general a division of sovereign authority among two or more political entities. Suzerainty normally originates in a grant of autonomy to a dependent area by the state formerly sovereign and becomes established when that grant has received general recognition by the members of the Family of Nations. The autonomous area or vassal state therefore has a status in international law, possessing that degree of sovereignty within the area it occupies which has been granted to it, the residuum of sovereignty re-

[8] For term "treaty power" see *infra*, Chap. 6, note 90.

maining with the suzerain.[9] Protectorate arises when a formerly sovereign state (the protected state) has entered into relations with a sovereign state (the protecting state) by which some of its sovereignty, particularly its power to conduct foreign relations, has passed to the latter.[10] It will thus be seen that in the case of suzerainty the basic documents determining the distribution of sovereignty are of a constitutional order, whereas in the case of protectorate such documents are of an international order, normally treaties. Mandated territories are areas the status of which is defined by Article 22 of the League of Nations Covenant and a document issued in pursuance thereof known as the mandate. The mandate is in the form of an agreement between the Principal Allied and Associated Powers, to whom the territory was transitionally ceded by the World War treaties, and the mandatory, confirmed by the Council of the League of Nations. While the distribution of sovereign authority with respect to these territories is controversial the following statement seems to the writer to indicate the situation:

> The sovereignty of the areas is vested in the League, acting through the covenant amending process, and is exercised by the mandatory with consent of the Council for eventual transfer to the mandated communities themselves.[11]

In the following list the territories are placed under the state which has the greatest degree of *de jure* sovereignty in the area.

I. China
  A. China proper (eighteen provinces) all under Chinese *de jure* sovereignty.
    1. Areas under *de facto* as well as *de jure* sovereignty of China.
    2. Japanese-occupied areas (North China and Nanking puppet governments), under Japanese military government.[12]

[9] Q. Wright, *Mandates*, pp. 301, 305; W. W. Willoughby and C. G. Fenwick, *Types of Restricted Sovereignty and Colonial Autonomy*, Washington, Government Printing Office, 1919, pp. 8, 11; E. D. Dickinson, *The Equality of States in International Law*, Cambridge, 1920, pp. 236-40. China's relations with such areas as Mongolia and Tibet were perhaps feudal rather than sovereign prior to the recent grants of autonomy.

[10] Q. Wright, *Mandates*, pp. 301, 392; "The Tunis Nationality Decrees," *P.C.I.J.*, Ser. B, No. 4; Sobhuzza II vs. Miller, L. R. (1926) A.C. 528; Anson, *The Law and Custom of the Constitution*, 3rd ed., Oxford, 1908, Vol. 2, Pt. 2, pp. 59-63, 90-2; W. E. Hall, *Foreign Powers and Jurisdiction of the British Crown*, p, 218; Lindley, *The Acquisition and Government of Backward Territory in International Law*, pp. 186, 206; Willoughby and Fenwick, *op. cit.*, pp. 6-9; Dickinson, *op. cit.*, pp. 240-7.

[11] Q. Wright, *Mandates*, p. 530.

[12] See *The Chinese Year Book, 1938-39*, Chungking, pp. 228ff.

3. Kwangchouwan. Jurisdiction leased to France for ninety-nine years in 1898. During the Washington Conference the French representative declared that France would restore this leased territory if all the other powers would do the same.
4. Kowloon extension. Jurisdiction leased to Great Britain for ninety-nine years in 1898.
5. Peking legation quarter. Placed "under the exclusive control" of the legations by the Boxer Protocol of 1901.
6. Taku and communication from Peking to the sea. Demilitarized by Boxer Protocol of 1901 and protected by foreign troops.[13]
7. Shanghai international settlement. Administered by Shanghai municipal council under supervision of diplomatic corps.[14]
8. Amoy international settlement (Kulangsu). Administered by Amoy municipal council.

9-20. Twelve residential concessions in ports opened to foreign residence by treaty. Administered under the authority of foreign consuls, one in Amoy (Japan), two in Canton (Great Britain and France), two in Hankow (France and Japan), one in Hangchow (Japan), one in Shanghai (France), one in Soochow (Japan), four in Tientsin (Great Britain, Japan, France, Italy).[15]

[13] China agreed to withdraw troops from an area of some 5,000 square miles between the Great Wall and a line north of Peking and Tientsin running from Yenchin through Changping, Shunyi, Tungchow, Paoti to Luto, by the Tangku Truce of May 31, 1933, and Japan agreed eventually to withdraw its troops to the Wall, leaving the area to be controlled by the Chinese police. This, however, was, as an armistice, by its nature temporary and was abandoned in 1937. It did not manifest an intention to create a permanent demilitarized zone. (See *Manchoukuo Year Book, 1934*, p. 148; *Bulletin of International News*, June 8, 1933, Vol. 9, p. 15; and Roy H. Akagi, *Japan's Foreign Relations*, Tokyo, 1936, p. 508.) The same can be said of the supplementary Ho-Umetzu agreement of June 10, 1935. This appears to have been an extremely informal arrangement resulting from Chinese Minister of War Ho's acceptance of six demands, including the removal of certain divisions from North China, made by Japan on the allegation that the Chinese had violated the Tangku truce. (*Ibid.*, June 13, 1935, p. 9-10; Toynbee, *Survey of International Affairs, 1935*, p. 326.)

[14] The Shanghai armistice of May 5, 1932, between China and Japan, fixed a line to the west of Shanghai as a temporary limit for the advance of Chinese troops, pending further arrangements upon the re-establishment of normal conditions, and provided for the withdrawal of Japanese troops to the International Settlement and the extra settlement roads (streets) as previous to January 28th. The Chinese added two qualifications to the agreement. The first declared that nothing in the agreement was to imply permanent restriction of the movement of Chinese troops in Chinese territory, and the second that it was to be understood that, even in areas temporarily provided for the stationing of Japanese troops, all municipal functions, including that of policing, would remain with the Chinese authorities. This obviously was not intended to create a permanently demilitarized zone. See *Lytton Report*, League of Nations. Pub. VII, Political, 1932, vii 12, p. 86; *Bulletin of International News*, May 12, 1932, p. 10.

[15] See *The China Year Book, 1939*, Shanghai, pp. 103, 158, 543.

B. Manchuria

21. "Manchukuo" including three eastern provinces of China, Fengtien (Liaoning), Kirin, and Heilungkiang (formerly called Manchuria) and the province of Jehol (formerly part of Inner Mongolia). Recognized to be under *de jure* sovereignty of China by most of the states of the world, *de facto* administered by government of "Manchukuo" in alliance with Japan and recognized as an independent state by Japan, San Salvador, Italy, Germany and Poland. "Manchukuo" declared on November 5, 1937, that all extraterritorial rights in its territory would be discontinued.[16]
22. Kwantung in Liaotung Peninsula. Jurisdiction leased to Russia for twenty-five years in 1898. The remainder relinquished by Russia and released by China to Japan in 1905. The Sino-Japanese treaty of 1915, the validity of which China contests, extended the lease to ninety-nine years. China announced that the lease had come to an end in 1923, but the area has in fact continued in the possession of Japan.
23. South Manchuria railroad zone. Administered by Japan until December 1, 1937, on the basis of a clause of questionable interpretation in the original concession for the construction of the railroad given by China to Russia in 1898 and subsequently transferred by Russia to Japan in 1905. The treaty of November 5, 1937, between Japan and "Manchukuo" abolished Japanese extraterritoriality and transferred Japanese administration rights in the railway zone to "Manchukuo."[17]

C. Mongolia

24. Inner Mongolia (provinces of Jehol, Chahar, Suiyuan and Ningsia). Under *de jure* sovereignty of China, and in large part under *de facto* control of government of "Manchukuo" (Jehol), or under Japanese military occupation.
25. Outer Mongolia. Autonomous state under Chinese suzerainty according to Russo-Chinese exchange of notes of 1913 and Russo-Chinese-Mongol treaty of 1915, but under Chinese sovereignty according to Sino-Soviet treaty of 1925, and administered by Mongolian Peoples Republic in close relations with the Soviet Union.

D. Tibet

26. Provinces of Chinghai (Koko Nor) and Hsik'ang (Chwanben or Kham), sometimes called Inner Tibet. Under Chinese *de jure* and *de facto* sovereignty.
27. Tibet proper. Under Chinese *de jure* suzerainty, but governed *de facto* by autonomous state of Tibet (Dalai and Panchan lamas) under a *de facto* British protectorate. In the treaty of 1906 with Great Britain, China recognized the British-Tibetan treaty of the same year. A British treaty

[16] *Contemporary Manchuria, A Bi-Monthly Magazine* (South Manchuria Railway Co.), Jan. 1938, Vol. 2, p. 28.

[17] *Ibid.*, Vol. 2, pp. 16ff.

with Russia of 1907 recognized Tibet as under Chinese suzerainty. A division of Tibet into Inner and Outer Tibet was proposed in Sino-British negotiations of 1914 and 1919, but no agreement was reached.

28. Boundary zone of Tibet ten miles wide along Burmese frontier. Demilitarized by Article VII of treaty of 1894 between China and Great Britain.

E. Sinkiang

29. Sinkiang (Chinese Turkestan). Under Chinese sovereignty *de jure* with much Soviet influence. Boundary with Russia in region of Ile settled by treaty of February 24, 1881.

II. Japan

30. Japan proper. Under sovereignty of Japan. Includes Bonin (Ogassawara) annexed 1861, Lew Chew (Ryukyu) annexed 1879, and Kurile Islands (acquired by treaty with Russia, 1875), as well as main islands of Honshu, Hokkaido, Shikoku and Kyushu.

31. Korea (Chosen). Under sovereignty of Japan on condition of according dignity and honor to the former imperial house of Korea by treaty of August 22, 1910.

32. Japanese insular possessions in the Pacific (Karafuto or southern Sakhalin, Formosa and the Pescadores). Under Japanese sovereignty and guaranties of the Four Power Pacific Treaty.

33. Karafuto or southern Sakhalin Island. Demilitarized by Article IX of Treaty of Portsmouth.

34. North Pacific islands. Administered by Japan under mandate of the League of Nations, providing for demilitarization and under guaranties of the Four Power Pacific Treaty.

35. Island of Yap (one of the North Pacific islands). Under Japanese mandate, subject to rights of the United States with respect to entry and residence of its nationals and electrical communications under the treaty of 1921.

III. Thailand (Siam)

36. Thailand. Recognized sovereign state, member of the Family of Nations.

37. Zone 25 kilometers on each side of Mekong River, which constitutes the boundary of Thailand and French Indo-China. Demilitarized by treaty of 1926 between France and Siam.

IV. Union of Soviet Socialist Republics

38. Far Eastern territory of Russian Soviet Federated Socialist Republic. Under sovereignty of U.S.S.R. From April 1920 to November 24, 1922, this territory was recognized by the U.S.F.S.R. as an independent state, the Far Eastern Republic, with its capital at Chita. On the latter date the two voluntarily united.[18]

39. Sakhalin Island north of 50th parallel. Territory of R.S.F.S.R.

[18] H. S. Quigley, "The Far Eastern Republic, a Product of Intervention," *Am. Journ. Int. Law*, Jan. 1924, Vol. 18, pp. 82ff.

under sovereignty of U.S.S.R. demilitarized under Article IX of Treaty of Portsmouth, 1905.

V. Great Britain

40. Island of Hong Kong and part of adjacent mainland area of Kowloon. Under British sovereignty. Ceded by Treaties of Nanking (1842) and Peking (1860).
41. British North Borneo (British North Borneo Company). Under British protectorate.
42. Brunei. Native sultanate. Under British protectorate, administered by Great Britain.
43. Sarawak. Native state administered by Rajah Brooke under British protectorate.
44. Federated Malay States (Perak, Selangor, Pahang, Negri-Sembilan). Under British protectorate.
45-49. Five unfederated Malay states (Johore, Kedah, Perlis, Kelantan, Trengganu). Under British protectorate.
50. Straits Settlements (including Singapore, Malacca, Penang, Province Wellesley, the Dindings, and the island of Labuan). Under British sovereignty. The governor is also high commissioner for the protectorates of British North Borneo, Brunei, Sarawak and the Malay States, which together constitute British Malaya.
51. Burma (including 47 Shan and Karenni States). Under British sovereignty. Administered as part of India until 1935 when it became a Crown Colony.
52. Zone ten miles wide along Tibetan frontier of Burma. Demilitarized by treaty of 1894 between Great Britain and China.
53. India, including 562 native states occupying over a third of the territory and containing over a fifth of the population, nominally under British protectorate though they probably enjoy no status under international law.[19] The Indian empire as a whole has an independent international status as a member of the League of Nations, but not full dominion status.
54. Andaman and Nicobar Islands. Under British sovereignty.

VI. France

55. Cochin China. Under French sovereignty.
56-59. Four Indo-Chinese states (Tonkin, Annam, Laos, Cambodia). Under French protectorate but administered with Cochin China by the French government as the French colony of Indo-China. The northern portion and Camranh Bay in the south were occupied by Japan in 1940 and 1941.

VII. Netherlands

60. Netherlands Indies, including 282 native states occupying about half of the area and containing about a fifth of the population, nominally under Dutch protectorate. According

[19] H. A. Smith, *Great Britain and the Law of Nations*, Vol. 1, p. 39.

to international law all under *de jure* Netherlands sovereignty.[20]

VIII. Portugal

61. Macao. Under Portuguese sovereignty.

IX. United States of America

62. Aleutian Islands and Guam. Under United States sovereignty, and under guaranty of Four Power Pacific Treaty.

63. Philippine Islands. Autonomy under Commonwealth of the Philippines, instituted November 15, 1935, subject to *de jure* United States sovereignty until 1946, and under guaranty of Four Power Pacific Treaty.[21]

64. Sulu Archipelago. Part of Philippine Islands.[22]

X. Tannu Tuva

65. Tannu Tuva. *De facto* state, recognized by the Union of Soviet Socialist Republics with which it has close relations.

XI. Nepal

66. Nepal. *De facto* state, recognized by Great Britain and China, in close relations with the former.

[20] Amry Vandenbosch, *The Dutch East Indies*, Grand Rapids, Mich., 1933, p. 139.

[21] Section 11 of the Tydings-McDuffie Act of March 24, 1934, providing for eventual independence for the Philippines states: "The President [of the United States] is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved." This act also provides that during the commonwealth period, Philippine citizens owe allegiance to the United States, Philippine officers take an oath to recognize and accept the supreme authority of the United States, "Foreign affairs are under the direct supervision and control of the United States," the United States exercises supreme military control in the islands, decisions of Philippine Courts are subject to review by the Supreme Court of the United States, the United States may intervene to preserve the Philippine government, protect life, property and individual liberty and to discharge government obligations as provided in the Constitution, and the authority of the United States High Commissioner shall be recognized. (Sec. 2, a.)

[22] Commodore Charles Wilkes in behalf of the United States made an agreement with the Sultan of Sulu on February 5, 1842, which treated the latter as a sovereign (Hunter Miller, *Treaties and Other International Acts of the U. S. A.*, Washington, Vol. 4, p. 349), but apparently subsequently the United States acquiesced in the Spanish claim of sovereignty, formally recognized by Great Britain and Germany in the Protocol of March 7, 1885, and most of the Sulu Archipelago was included in the cession of the Philippines by the Treaty of Paris, December 10, 1898. General J. C. Bates made an agreement with the Sultan, however, on August 10, 1899, by which "the sovereignty of the United States in the whole Archipelago of Jolo and its dependencies is declared and acknowledged" (President McKinley's Message, December 5, 1899, Moore, *Digest of International Law*, Vol. 1, p. 531), and a treaty with Spain of November 7, 1900, ceded to the United States the remaining Sulu Islands, apparently omitted from the Treaty of Paris by inadvertence. (President McKinley's Message, Dec. 3, 1900, Moore, *Digest, loc. cit.*)

XII. Bhutan

67. Bhutan. *De facto* state, recognized by Great Britain and China, in close relations with the former.

The foregoing classification ascribes *de jure* personality to certain political entities, and ascribes certain territorial rights in the Far East to these entities.

We will consider in the next two chapters (1) the evidence which permits us to ascribe a jural personality to these entities, and (2) the legal materials which prove title to these territorial rights and define their scope and nature.

CHAPTER IV

THE JURAL PERSONALITIES WITH TERRITORIAL INTERESTS IN THE FAR EAST

As indicated in Chapter II, the status of entities under international law is established by two sorts of evidence: (1) that bearing upon the will and capacity of the entity in question to meet responsibilities under international law, and (2) that bearing upon the will of the Family of Nations to admit the entity to the benefits of international law.

When evidence of the first type indicates that the entity has full capacity to meet responsibilities under international law and desires to do so, in other words, that it conforms to all the objective and subjective conditions of statehood, there is a presumption that it has been admitted to the Family of Nations, though this presumption may be rebutted by evidence of the second type to the contrary. Furthermore, while there is a presumption that a state not conforming to these conditions has not been admitted as a full member of the Family of Nations, this also may be rebutted by evidence of the second type to the contrary.

Thus the conclusive evidence for determining status is that of the second type, and, as indicated in Chapter II, it appears from the evidence available that the Family of Nations has admitted the principal Far Eastern countries to the benefits of international law. The Family of Nations, however, has not developed procedures through which it clearly manifests its collective will on all occasions. Ordinarily its attitude is manifested only through the consensus of the will of its members expressed in individual acts of recognition over a long period of time. Consequently it is desirable to examine in more detail the historical evidence bearing upon the attitude and capacity of the Far Eastern states with respect to the Family of Nations, and the attitude toward them of the members of the Family of Nations with which they have had relations.

The entities with territorial rights in the Far Eastern area may be classified as independent states, recognized and unrecog-

nized; dependent states, including vassal or autonomous states, protectorates and mandated communities; and collective entities.

1. *Recognized states.* The general recognition and membership in the Family of Nations of Great Britain, France, the Netherlands, Portugal and the United States will hardly be contested.

The Soviet Union. The Soviet Union now maintains diplomatic relations with most of the world, is a party to the Pact of Paris and numerous general international conventions, and was a member of the League of Nations until expelled in 1939 because of its aggression against Finland. Whether it should be regarded as the same state as the Russian Empire, and consequently bound by the treaties of that empire, is controversial, though apparently the Soviet Union has relied on these treaties unless they have been expressly denounced.[1] It exercises

[1] The continuity of the state has in general been recognized in spite of great changes in government or even territory, as in the case of France during the revolutionary period, the Netherlands through its absorption by France from 1795 to 1815, or even Poland through 123 years when it had no territory, population or government, though the last case is controversial. (See Republic vs. Pantol, Polish Supreme Court, September 30, 1922; Williams and Lauterpacht, *Annual Digest of Public International Law Cases, 1919-1922,* p. 35; Oppenheim, *International Law,* 5th ed., 1937, Vol. I, pp. 142ff. See also The Sapphire, 11 Wall. 164.) The Soviet Union renounced the Russian Imperialistic Treaties in 1917 and 1919, apparently assuming that without such renunciation it would have been entitled to them, and provided for a conference, in its treaty of 1924 with China, to consider what of the old treaties should be terminated by this principle. It agreed with Japan that the treaty of Portsmouth "shall remain in full force" and that other treaties between Japan and Russia before November 7, 1917, "shall be re-examined at a conference" for "revision or annulment as altered circumstances may require." Other states have regarded their treaties with Russia as binding on the Soviet Union. The United States Department of State included treaties with Russia in its index of Treaties in force on December 31, 1932. (*Treaty Information,* Supplement to Bulletin No. 39.) With the generally accepted principle that executory treaties lapse with the death of a state, these positions seem to be based on the assumption that the Russian State did not die. "It is of no consequence that Russia internally has been undergoing a political change. The primary consideration is that she has not thereby ceased to exist internationally as a state." (The Russian Roubles attempted counterfeiting case, Japanese Supreme Court, 1919; Williams and Lauterpacht, *op. cit.,* pp. 31-2.) The Soviet Union has considered itself successor to the Chinese Eastern Railway and other extraterritorial concessions of the Russian Empire. The Soviet-American agreement of 1933 dealt with certain claims of the Soviet Union as "the successor of prior governments of Russia." This phraseology is consistent with the assumption either of continuity or of succession, though with the latter assumption, Finland, Lithuania and other states carved from Russian territory would share in such claims.

sovereignty over most of the territory formerly within the Russian Empire and it claims title to the property owned by the Russian Empire outside of this territory, including the property of embassies and consulates. It would appear, therefore, that the Soviet Union is a member of the Family of Nations and in international law is the same state as Russia.[2] Its frontiers with Japan on the island of Sakhalin and between Korea and the maritime provinces have been defined by treaty. Its frontiers with Manchuria, Mongolia and Sinkiang, though established by treaties, have been the subject of controversy in recent years, especially with respect to islands in the Amur River and the boundaries between the maritime provinces and Manchuria north of Korea.[3]

[2] Some of the constituent republics of the Soviet Union made treaties and functioned as independent states after the collapse of the Russian Empire in 1917 and before formation of the Soviet Union in 1923 (see Taracouzio, *The Soviet Union and International Law*, 1935), and all eleven of them, recognized in the Constitution of 1936, have "equal rights" and "sovereign rights" protected by the Union, including the right to secede and to exercise independently all state powers not delegated to the Union by Article 14 of the Constitution. (Arts. 13, 15, 17.) Four of the constituent republics—the Russian S.F.S.R., the Tadjik S.S.R., the Kazakh S.S.R. and the Kirghiz S.S.R.—have common frontiers with China. The Union is, however, defined as a "socialist state" (Art. 1) and "a federated state" (Art. 13) and has a "uniform union citizenship" (Art. 21), supremacy of its law over those of the constituent republics (Art. 20), and such extensive powers, especially in defense, foreign relations and economic organization (Art. 14) that it is believed to be the only jural personality from the point of view of international law in the area. Apart from adding new constituent republics, the constitution of 1936 was similar to that of 1924 in these matters.

[3] The Soviet-Chinese boundary at the junction of Afghanistan and Sinkiang was established by the Russo-British Pamirs commission of 1895. The boundaries of the Soviets with Sinkiang and Mongolia were defined as the water-shed between rivers flowing east and south and those flowing west and north by the treaty of Peking, November 14, 1860 (*Br. For. St. Pap.*, 53:970), supplementing the treaty of Kiakhta, 1728, and supplemented by protocols of a conference, October 7, 1764 (*Ibid.*, 67:174). This description apparently left the valley of Tannu Tuva in the territory of neither. The treaty of St. Petersburg, February 19, 1881, supplementing this, established the boundary of Ili in Sinkiang (*Ibid.*, 72:1143). The treaty of Peking, 1860, also defined the Argun, Amur and Ussuri River boundaries of Manchuria and the land frontier south of the Argun which had been dealt with in part by the treaty of Nerghinsk, 1689 (Martens, N.R.G., 17, Pt. 2:173); Kiakhta, 1728 (Martens, N.S., 1:711), and Argun, May 16, 1858 (*Br. For. St. Pap.*, 53:964). This frontier was more precisely defined in the treaty of Tsitsihar, December 20, 1911 (*Ibid.*, 104:883), accompanied by maps. The Tumen River boundary between Soviet territory and Korea and the land frontier between a point 20 Chinese *li* up the Tumen and the Ussuri were also established by the treaty of Peking (1860) and maps were exchanged, specifying this in detail as well as other portions of the Manchurian boundary on June 16, 1861 (Martens, N.R.G., 17, Pt. 2:192). During the hostilities in this area at Changkufeng in August 1938, Soviet Commissar Litvinoff, in conversation with Japanese Ambassador Shigimetsu, relied upon the Treaty of Hunchun, June 26, 1886, with

Japan. Japan was not known to the Western world before the time of Marco Polo though it had had relations with China since the fifth century A.D.[4] Portuguese merchants and missionaries established regular contact with the country in the middle of the sixteenth century, Spain followed by the end of that century, and Western influence penetrated rapidly until in 1597, after his failure to conquer Korea, the Japanese dictator Hideyoshi began to enforce his edict of 1587 against Christianity. This was carried out by his successors, stimulated by Protestant Dutch merchants, until, after a rebellion in 1640, the Catholics were exterminated and the Dutch were permitted a very limited trade to the little island of Deshima in the port of Nagasaki.

With this exception Japan remained a hermit nation until Commodore Perry's expedition in 1854. While unequal treaties were made soon after this with Japan by the principal European powers, Japan rapidly perceived the advantage of equal treatment and embarked upon a continuous campaign after 1880 to rid itself of the unequal treaties.[5] It entered into regular diplomatic relations with Western powers after the restoration of the power of the emperor in 1867, and its statesmen professed respect for international law with which they became acquainted through the Japanese edition of Wheaton's *International Law* in 1865. Jurists trained in that field accompanied the army and fleet of Japan in the Sino-Japanese War of 1894 and wrote treatises on the operations from the point of view of international law.[6] Following Japan's victory in this war, treaties were made with the powers in 1895 whereby extraterritoriality was terminated in 1899, although the Permanent Court of International Arbitration at The Hague held in 1905 that a few vestiges remained of certain tax exemptions, and tariff restrictions were not entirely eliminated until 1911. Japan participated in The Hague Conference of 1899, and after its alliance

attached maps, but no such treaty appears in any of the available treaty collections. (Walter Duranty, *New York Times,* August 7, 1938, p. 1.)

[4] Morse and MacNair, *Far Eastern International Relations,* p. 28. The historical facts in this study are taken mainly from this excellent volume.

[5] See Chap. 6, note 104.

[6] Takahashi, *Case on International Law during the Sino-Japanese War,* Cambridge, 1899; N. Ariga, *La Guerre Sino-Japanaise au point de vue du droit international,* Paris, 1896. These men wrote similar treatises on the Russo-Japanese War of 1904-5

with England in 1902 and its victory over Russia in 1905 it was considered one of the great powers. It participated with the Allies in the World War and was accorded a permanent seat in the Council of the League of Nations, of which it was an original member.

The Japanese insistence on equality, not only political but racial, was manifested in its unsuccessful effort to have a "racial equality" clause inserted in the League of Nations Covenant and its objection to the American discriminatory immigration act of 1924.[7] There can be no doubt that Japan has been a full member of the Family of Nations, at least since 1899. Although it withdrew from membership in the League of Nations by denunciation in accordance with the terms of the Covenant in 1933, it has continued diplomatic relations with the powers of the world and has continued to participate in other international organizations.

The Japanese land frontier with the Soviet Union on Sakhalin Island is defined by the Treaty of Portsmouth of 1905, and in northern Korea by the Sino-Russian treaty of 1860. The frontier between Korea and "Manchukuo" is defined in part by the Sino-Japanese treaty of 1909 concerning the Chientao region.[8]

Siam. Siam was a tributary state of China when first visited by the Portuguese in the sixteenth and by the Japanese in the early seventeenth century. Trade was carried on with the Dutch after 1604, with whom a treaty providing for extraterritoriality was concluded in 1664. The Spanish and French entered into commercial relations in the late seventeenth century and the British in the nineteenth. The latter made a commercial treaty in 1826 on an equal basis, with no provisions for extraterritoriality, and the United States made a similar treaty in 1833. In 1855, however, a new treaty with England and in 1866 with the United States provided for extraterritoriality. Under threats of violence France gained extraterritorial rights in Siam by a treaty of 1893. The prospect, however, that Siam would be entirely absorbed by the French in Indo-China and the British in Burma did not materialize. Siam attended the Hague Conferences of 1899 and

[7] See Akagi, *op. cit.*, pp. 322ff., 441ff.

[8] The Korean-Manchurian frontier is marked by the Tumen and Yalu rivers whose sources almost meet in the Peishan mountains; but I have not been able to find any document describing this boundary other than that mentioned which recognizes the Tumen boundary and, at its source, the Shikyishwei.

1907. It became an original member of the League of Nations and by a gradual process begun by the American treaty of 1920 has been relieved of extraterritoriality.[9] It is now a fully sovereign state, member of the Family of Nations. Its boundaries with French Indo-China have been defined by treaties of 1893, 1904, 1926 and 1941, and with Burma by the treaty of 1909, supplemented by an exchange of notes on March 14, 1932.

China. China has had occasional communication and cultural relations with the West since the Augustan Age, but relations did not become continuous until the establishment of trading posts by the Portuguese in the early sixteenth century and by the Spaniards half a century later. The Dutch and English began trading relations in the seventeenth century. Portuguese efforts to establish diplomatic relations in the sixteenth and seventeenth centuries and similar Dutch efforts in the seventeenth century were unsuccessful because of China's refusal to recognize the equality of the Western powers, an attitude symbolized by the demand for the *kowtow*.

Russia, whose land frontier had become contiguous with China, sent an unsuccessful mission in 1567 and made the first treaty of a Western nation with China after brief hostilities on the Amur River at Nerghinsk in 1689. This treaty restored peace, defined the boundary and provided for its protection on an equal basis but made no provision for continuous intercourse. Russia concluded another treaty with China at Kiakhta in 1728, and in 1733 China sent to St. Petersburg its first and only embassy to a Western country prior to 1867.

The British sent unsuccessful missions in 1793 and 1816, but treaty relations were not established until after the first Anglo-Chinese War by the Treaty of Nanking in 1842. This treaty provided for the opening of certain ports to commerce, and supplementary resolutions in 1843 provided for extraterritorial jurisdiction over British subjects. Although similar privileges were soon acquired by France, the United States and other states, there seems to have been no reciprocal acknowledgment that relations were governed by general international law at this time. The Chinese were more reluctant to acknowledge equality than were the Western nations. Continuous diplomatic missions were established in China by the principal Western

[9] F. B. Sayre, "The Passing of Extraterritoriality in Siam," *Am. Journ. Int. Law*, Jan. 1928, Vol. 22, pp. 70ff.

powers after the second Anglo-Chinese war of 1858, but ceremonial and procedure rested on express provisions of treaty, not on general custom and rules of international law as in the relations of European states *inter se*. The treaties were non-reciprocal and provided for extraterritorial, civil, and criminal jurisdiction by foreign consuls in China. They were thus inconsistent with basic principles of international law—equality and territorial sovereignty.

The Chinese, however, acquired experience with European practice as trade, missionary, diplomatic and military relations increased, and with European theory after Wheaton's *International Law* had been translated into Chinese by W. A. P. Martin, under order of the Chinese government in 1864. In 1867 China dispatched its second diplomatic mission abroad under an American, Anson Burlingame, thus manifesting a desire to learn of the West at first hand, a desire increasingly realized in the steady stream of Chinese students who have continued to go abroad.

Mutual desire for equality of relations under general international law began to be manifested at the turn of the century when China was invited for the first time to a general international conference, that at The Hague in 1899. This disposition was strengthened by the Hay Open-Door notes of the same year, manifesting a reaction from the activities of the great powers during the preceding years in attempting to divide China into spheres of interest, if not into colonial areas. The powers agreed in the Boxer exchange of notes to respect the territorial integrity and administrative entity of China, and in 1903 the Sino-American treaty provided that diplomatic intercourse be based on "international usage," that diplomatic and consular relations should be reciprocal, that most favored nation treatment should be accorded in regard to tariff and other commercial matters reciprocally, and that the United States was to withdraw extraterritoriality when convinced that China had achieved its "strong desire to reform its judicial system and to bring it in accord with that of Western nations." The latter provision follows that in the Anglo-Chinese treaty of 1902 and was incorporated in the Sino-Japanese treaty of 1903. Since that time, and particularly since the establishment of the Chinese Republic in 1911, the Chinese government has consistently sought to eliminate extraterritorial jurisdiction, concessions, leased ports, for-

cign military forces and other derogations from its territorial sovereignty based upon "unequal treaties" or practice. China became an original member of the League of Nations by ratifying the Treaty of Saint-Germain, and has partieipated since the World War in international organization on an equal basis.

The propriety of Chinese efforts to eliminate unequal treaties was recognized in principle by resolutions of the Washington Conference of 1922, and this principle was given some application in the elimination of the treaty tariff and the negotiation of equal treaties contingently abolishing extraterritoriality with a number of states from 1928 to 1930. Great Britain, the United States, France and Japan did not make treaties of the latter type, but the Chinese government declared extraterritoriality at an end with respect to all states in 1930. This was not acquiesced in by the powers nor was it enforced by China, but the history of events since 1903 makes it clear that China has been recognized as a full member of the Family of Nations, entitled to the full benefits of general international law, except insofar as special treaties still impose certain disabilities.[10]

Has China ceased to be a state? Japan has argued that because of civil disorder, inability to give protection to foreigners in all portions of its territory, and occasional division of governmental authority, China has ceased to be an organized state and consequently is no longer entitled to rights under international law.[11] Do such conditions affect status under international law? Evidence may be sought in the practice of states in respect to recognitions of independence and responsibility for injuries to aliens.

States have frequently declined to recognize a new state on the ground that its government is unstable or incapable of maintaining order or of meeting international responsibilities.[12] States with dependencies clamoring for self-determination have

[10] M. T. Z. Tyau, *The Legal Obligation Arising Out of Treaty Relations between China and Other States,* Shanghai, 1917, pp. 208-9.

[11] See *Lytton Commission Report,* p. 17: "The Japanese Government do not and cannot consider that China is an 'organized people' within the meaning of the League of Nations Covenant." Japanese statement to President of the League of Nations Council, Feb. 23, 1932. See also "The Present Condition of China," Document A, submitted by Japan to the League of Nations, 1932, p. 131; K. K. Kawakami, *Japan Speaks,* N. Y., 1932, pp. 140, 173; J. Shinobu, *International Law in the Shanghai Conflict,* Tokyo, 1933, pp. 36ff.

[12] C. C. Hyde, *International Law,* Vol. I, pp. 55ff.; W. H. Ritsher, *Criteria of Capacity for Independence,* Jerusalem, 1934, Chap. 5.

occasionally examined the criteria of independence.[13] The League of Nations has had occasion to assert general principles on this subject upon the admission of new members and the emancipation of mandated communities.[14] In its report to the Council on June 27, 1931,[15] the Permanent Mandates Commission thought that the emancipation of territory under mandate should be dependent on two classes of preliminary conditions. First, the existence in the territory concerned of *de facto* conditions which justified the presumption that the community is able "to stand by itself under the strenuous conditions of the modern world," and secondly, the furnishing of certain guaranties, especially in regard to the protection of minorities, the protection of the interests of foreigners, the assurance of freedom of conscience and religion, the protection of missionary activities, the maintenance of financial obligations, of vested rights and of treaties binding upon the territory. The *de facto* conditions are pertinent here. In this connection the Commission reported:

> Whether a people which has hitherto been under tutelage has become fit to stand alone without the advice and assistance of a mandatory is a question of fact and not of principle. It can only be settled by careful observation of the political, social, and economic development of each territory. This observation must be continued over a sufficient period for the conclusion to be drawn that the spirit of civic responsibility and social conditions have so far progressed as to enable the essential machinery of a state to operate and to insure political liberty.
>
> There are, however, certain conditions the presence of which will in any case indicate the ability of a political community to stand alone and maintain its own existence as an independent state.
>
> Subject to these general considerations, the Commission suggests that the following conditions must be fulfilled before a mandated territory can be released from the mandatory régime—conditions which must apply to the whole of the territory and its population: (a) it must have a settled government and an administration capable of maintaining the regular operation of essential government services; (b) it must be capable of maintaining its territorial integrity and political independence; (c) it must be able to maintain the public peace throughout the whole territory; (d) it must have at its disposal adequate financial resources to provide regularly for normal government requirements; (e) it must possess laws and a judicial organization which will afford equal and regular justice to all.

[13] Ritsher, *op. cit.*, Chaps. 3 and 4 on Philippines and India.

[14] *Ibid.*, Chaps. 2, 6.

[15] *Permanent Mandates Commission, Minutes,* Vol. 20, pp. 228-9. Compare with statement of conditions of state existence, Oppenheim, *International Law,* 5th ed., Vol. 1, p. 112.

These criteria are valuable guides to states and international conferences engaged in the legislative process of admitting new states to the Family of Nations. They are of use to the jurist, studying not what the status of an entity ought to be but what it is, only where evidence of the actual recognition of the entity by the Family of Nations is lacking. Where the evidence shows that the entity in question does not conform to these criteria there is a presumption that it has not been recognized. If available evidence proves that it has been recognized, its nonconformity in fact to these criteria does not automatically affect its legal status. Recognition once accorded is presumed to be permanent. The breaking of diplomatic relations with a government, or even the non-recognition of a *de facto* government of a member of the Family of Nations, does not terminate the recognition of the state.[16]

There is support in diplomatic correspondence for the proposition that "normal application (of international law) ceases to be possible in cases where a state becomes helplessly disorganized and is not in a position to exercise an effective control over its own territory," and that "a state which has fallen into anarchy ceases to be a state to which normal rules of international intercourse can be applied."[17] It is also true that the international commission on extraterritoriality, appointed in 1925 in pursuance of a Washington Conference resolution, stated conclusions (with a reservation from the Chinese member) which suggest that "the inability of the Chinese government to enforce its laws in its own country constitutes an obstacle to the immediate abolition of the extraterritoriality system."[18]

These propositions, however, cannot support the assertion that China has ceased to be a member of the Family of Nations subject to international law. If the facts asserted were true, they would merely suggest temporary modification of the procedures of international intercourse while such conditions prevail. Thus

[16] Foreign offices have occasionally stated that while they recognize a state, they do not recognize its *de facto* government as competent to represent it. See Q. Wright, "Suits Brought by Foreign States with Unrecognized Governments," *Am. Journ. Int. Law,* Oct. 1923, Vol. 17, pp. 742-6; Oppenheim, *op. cit.,* Vol. 1, pp. 125-7.

[17] H. A. Smith, *Great Britain and International Law,* Vol. 1, p. 18; Thomas Baty, "Can an Anarchy Be a State?" *Am. Journ. Int. Law,* July 1934, Vol. 28, pp. 444ff.; Q. Wright, *The Control of American Foreign Relations,* N. Y., 1922, pp. 15-20.

[18] H. A. Smith, *op. cit.,* p. 20.

the draft code on responsibility of states under international law prepared by the Research in International Law provides:[10]

> A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

The commentary states:

> It is to be recognized that in every state temporary abnormal conditions may result in a dislocation of its governmental organizations, and such possibility is to be taken into account in determining whether responsibility exists in a given case. . . . The present practice often tends to penalize a state for its weakness by requiring practically a guarantee of the continuity of normal governmental machinery. Such continuity is not always possible, as in the case of civil wars and local insurrection. It would seem that a state should not be held to duties which it cannot perform, provided the disability is temporary only and due to exceptional causes or circumstances.

It is clear that in international practice the *de facto* suspension of governmental authority because of revolution, civil war or foreign occupation has not been regarded as terminating the existence of a state. Such circumstances may eventually lead to foreign protests and invasions, which may in time result in the state ceasing to exist *de facto* because all of its territory has been occupied by others. Even such a calamity would not result in a termination of the state's existence *de jure* until the transfer of its territory had been generally recognized.

In the case of China, few states have recognized recent seizures of its territory, much territory remains under the control of the Chinese government, and that government is formally recognized by the governments of the world as representing a sovereign state. We conclude, therefore, that China is a sovereign, full member of the Family of Nations, entitled to benefit by the principles of general international law except in so far as special obligations may be imposed by unequal treaties still in force.

China's boundaries with the Soviet Union, Korea, Tonkin, Burma, Bhutan, Sikkim, Nepal, India and Afghanistan have been defined in most cases by treaty, but in many places are not clearly established on the spot. The boundaries between China proper and its dependencies are even less clear, especially the

[10] Art. 4, *Am. Journ. Int. Law, Spec. Supp., 1929,* p. 146.

boundaries between China and Tibet, between China and Mongolia, and between Mongolia and Manchuria.[20]

2. *Unrecognized states.* Tannu Tuva, formerly known as Uriankhai, between Mongolia and Siberia, has official relations only with the Soviet Union. Nepal and Bhutan, between India and Tibet, have relations only with Great Britain. "Manchukuo" has relations only with Japan, San Salvador, Germany, Italy and Poland. None of these states has participated in general international conferences nor have they become parties to general treaties. In the case of the first three, there appear at present to be no objections to their independent status nor claims to the territory that they occupy, though China claimed the territory of Tannu Tuva as recently as 1919 and at one time asserted suzerainty over Nepal and Bhutan.[21] Their position as *de facto* independent states has been acquiesced in by the members of the Family of Nations. Whether they conform sufficiently to the accepted criteria of independence as to deserve recognition might be questioned.

"Manchukuo." In the case of "Manchukuo" China claims sovereignty of all the territory it occupies, and China's sovereignty is recognized by most of the states of the world.

Chinese culture has always been active in the southernmost part of Manchuria, and the Ming dynasty (1368-1644) extended its rule over the territory west of the Liao river and received occasional tribute from chiefs in the remainder of the country. The Manchus were thus permeated by Chinese culture before they overthrew the Ming administration in Manchuria in 1616 and in 1628 passed the Great Wall to conquer China. The

[20] For Chinese boundaries with the Soviet Union see *supra,* note 3, and with Korea, *supra,* note 8. The Tonkin boundary is defined by treaties of June 26, 1887, and June 26, 1895 (*Br. For. St. Pap.,* 85:748, 87:523); the Burmese boundary by treaties of March 1, 1894, Feb. 4, 1897, and April 9, 1935 (*Ibid.,* 87:1311, 89:25; *L. of N. Treaty Series,* 163:177). The League of Nations participated in the settlement of this boundary on the spot by appointing the president of the mixed commission on Jan. 8, 1935. The Sikkim boundary is defined by the treaty of March 17, 1890 (*Ibid.,* 82:9). The boundaries of Bhutan, Nepal, the United Provinces, the Punjab and Kashmir with Tibet are defined by the Himalayas, but I have not found any document describing them. The boundary of Sinkiang with the long eastern projection of Afghanistan, between the Oxus River and the Hindu Kush Mountains, separating India from Soviet territory, was defined by the Anglo-Russian Pamir Commission in 1895. The geographer of the Department of State, Washington, D. C., compiled an excellent map of Chinese external and internal boundaries published in December 1932.

[21] *China Year Book, 1938,* p. 26.

Manchus maintained military rule in Manchuria and forbade the immigration of Chinese until 1878 when this policy was reversed with the result that at the time of the revolution (1911) the population of Manchuria was estimated at 18,000,000, largely Chinese. It has since increased to some 30,000,000 of which 95 per cent are Chinese, 3 per cent Korean, 1 per cent Japanese, the remainder mainly Manchus, Mongols, and Russians. "Manchuria," wrote the Lytton Commission in 1932, "is now unalterably Chinese."[22]

After a period of Russian penetration, followed by Russian and Japanese recognition of the Chinese sovereignty of Manchuria in Article III of the Treaty of Portsmouth, China centralized the administration of Manchuria under a viceroy in 1907. In spite of this, Manchuria was being divided into spheres of interest by the Russo-Japanese agreements of 1907, and the efforts of the United States through the Knox neutralization plan of 1909 to stop this development were unsuccessful.

Manchurian authorities first opposed revolution but accepted the presidency of Yuan Shi-k'ai in 1912. Chang Tso-lin was made military governor of Fengtien province in 1916 and Inspector General of all Manchuria in 1918. During the period of civil war which followed, Chang Tso-lin on occasion declared his independence of the central government of China and made separate treaties with the U.S.S.R., but these were incidents of civil war and "never meant that he or the people of Manchuria wished to be separated from China. . . . Through all its wars and periods 'of independence' therefore Manchuria remained an integral part of China."[23] The contention that Manchuria was merely in personal union with China during the Manchu period and never a part of the Chinese Empire does not accord with history.[24]

Marshal Chang Tso-lin was assassinated with the complicity of Japanese officers on June 3, 1928,[25] and his son Chang Hsueh-liang, the young Marshal, became ruler of Manchuria. He declared his allegiance to the national government of Chiang Kai-shek, against the advice of the Japanese, and pursued a policy

[22] *Lytton Commission Report*, p. 25.

[23] *Ibid.*, pp. 28-9.

[24] *Ibid.*, pp. 26-7.

[25] *Ibid.*, p. 28; Takeuchi, *War and Diplomacy in the Japanese Empire*, 1935, pp. 280-2; Morse and MacNair, *op. cit.*, p. 744.

unsatisfactory to both Japanese and Soviet interests which involved him in military conflict with Soviet forces in 1929.

Japan began hostilities on September 18, 1931, occupied the country, set up a government under the former Chinese emperor, Henry Pu-yi, in March 1932, recognized the latter as Emperor of "Manchukuo," and on September 15, 1932, made an alliance with him which secured all Japanese interests in Manchuria.

Count Uchida, the Japanese foreign minister, declared before the Japanese Diet on August 25, 1932, that "Manchukuo" was organized

as a result of the separatist movement within China herself, (that) the Nine Power Treaty does not forbid all separatist movements in China or bar the Chinese in any part of the country from setting up of their free will an independent state, (and) I hardly need to waste words once more disclaiming at this juncture any territorial designs on our part in Manchuria or anywhere else.[26]

The Lytton Commission, sent by the League of Nations and composed of a British, French, German, Italian and American member, reported on October 1, 1932, as a result of elaborate investigations on the spot, that:

The Japanese military operations begun on September 18, 1931, cannot be regarded as measures of legitimate self-defense, (though) this does not exclude the hypothesis that the officers on the spot may have thought that they were acting in self-defense. The independence movement which had never been heard of in Manchuria before September, 1931, was only made possible by the presence of Japanese troops and for this reason the present régime cannot be considered to have been called into existence by a genuine and spontaneous independence movement.[27]

These conclusions of the Report were endorsed by the resolution of the League of Nations Assembly on February 24, 1933, in the following words:

Without excluding the possibility that, on the night of September 18-19, 1931, the Japanese officers on the spot may have believed that they were acting in self-defense, the Assembly cannot regard as measures of self-defense the military operations carried on that night by the Japanese troops at Mukden and other places in Manchuria. Nor can the military measures of Japan as a whole, developed in the course of the dispute, be regarded as measures of self-defense. Moreover, the adoption of measures of self-defense does not exempt a state from complying with the provisions of Article XII of the Covenant. . . . A group of Japanese civil and mili-

[26] Akagi, *op. cit.*, p. 496.

[27] *Lytton Report*, p. 71.

tary officials conceived, organized, and carried through the Manchurian independence movement as a solution to the situation in Manchuria as it existed after events of September 18, and, with this object, made use of the names and actions of certain Chinese individuals and took advantage of certain minorities and native communities that had grievances against the Chinese administration.

This movement, which rapidly received assistance and direction from the Japanese general staff, could only be carried through owing to the presence of the Japanese troops. It cannot be considered as a spontaneous and genuine independence movement. The main political and administrative power in the "Government" of "Manchukuo," the result of the movement described in the previous paragraph, rests in the hands of Japanese officials and advisers, who are in a position actually to direct and control the administration; in general, the Chinese in Manchuria, who, as already mentioned, form the vast majority of the population, do not support this "Government" and regard it as an instrument of the Japanese.

The members of the League of Nations and the United States declared that they would not recognize this régime and to date it has been recognized only by Japan, El Salvador, Italy, Germany and Poland.[28] The Soviet Union has entered into local relations with Manchurian authorities, but insists it had no intention of recognizing that régime, and holds Japan responsible for any violation of Soviet-Manchurian frontiers.[29] Thus even the *de facto* existence of "Manchukuo" is not generally recognized. Its territory in law is still under the sovereignty of China.[30]

3. *Dependent states.* Dependent states can be classified as vassal or autonomous states and dominions, protected states, and mandated territories. The legal implication of these terms has already been discussed. The evidence to determine whether a particular entity belongs in one of these classes is to be found primarily in the terms used in the documents defining its relation to the member of the Family of Nations on which it is

[28] *Supra,* Introduction, notes 7-10.

[29] It appears that some Soviet consuls have received exequaturs from Manchukuoan authorities and some Manchukuoan consuls have been permitted to function in Soviet territory. *Manchukuo Year Book, 1934,* p. 154. An agreement appears to have been made between Soviet and Manchukuoan authorities for navigation of the Amur River, and the Soviet government sold the Chinese Eastern Railway to Manchukuo. South Manchuria Railway Co., *Fifth Report on Progress in Manchuria to 1936,* p. 196. But none of these acts would necessarily manifest an intention of the Soviet Union to recognize the state of Manchukuo. See Oppenheim, *op. cit.,* 5th ed., Vol. 1, p. 124; Research in International Law, "Draft Convention on Consuls, Art. 6," *Am. Journ. Int. Law,* April 1932, pp. 238ff.

[30] On the status of Manchuria see C. Walter Young, *Japan's Special Position in Manchuria,* Baltimore, 1931, Chap. 1.

dependent though the history of its actual relations to that state and of the attitude of third states may also be important. Outer Mongolia and Outer Tibet should probably be classified as vassal states under Chinese suzerainty.

Outer Mongolia. Mongolia constituted a base from which nomadic tribes continually attacked China, and the Great Wall was built in the third century B.C. as a defense. It, however, proved inadequate, and Genghis Khan's invasion of 1215 eventuated in the subjugation of all China by Kubla Khan in 1280 and the union of China and Mongolia under the Yuan dynasty until 1368. The Manchus had made certain of the Mongol princes' tributaries prior to their conquest of China and in the seventeenth and eighteenth centuries conquered the whole of Mongolia.

Russia recognized Chinese sovereignty of Mongolia in the treaty of 1881 in exchange for certain commercial privileges. Japan seems to have recognized Russian interest in Outer Mongolia in 1907 in exchange for Russia's recognition of Japan's interest in southern Manchuria and Eastern Inner Mongolia. In 1911 Great Britain recognized Russian and Japanese interests in Mongolia.

Chinese immigration, which had been prohibited in Mongolia before the middle of the nineteenth century, increased greatly after 1909, arousing Mongol opposition, and in July 1911 a Mongol mission to St. Petersburg requested Russian protection. After the Chinese revolution in 1911 a Mongol conference at Urga proclaimed independence and enthroned the Hutukhtu or living Buddha as emperor on December 28, 1911. Russia expressed sympathy with this movement but continued to recognize Chinese suzerainty and on January 1, 1913, made a treaty with Outer Mongolia recognizing its autonomy and confirming Russian interests which were extended by another Russo-Mongolian treaty of September 30, 1914. China, pressed by internal difficulties and the Japanese Twenty-one Demands, entered into a tripartite treaty with Russia and Outer Mongolia at Kiakhta on June 7, 1915, recognizing the latter's "autonomy" and China's "suzerainty."

After the Soviet revolution Chinese military pressure induced the Outer Mongol princes to petition for a cancellation of this autonomy. This was granted by China on November 20, 1919. After Russian White forces under Baron Ungern had been

driven out of Mongolia by Red forces, the R.S.F.S.R. made a treaty with the "Mongolian Peoples Republic" on November 5, 1921, recognizing it as the "sole legal government of Mongolia." Three years later, however, in the Sino-Soviet treaty of May 31, 1924, the Soviet Union "recognizes that Outer Mongolia is an integral part of the Republic of China and respects China's sovereignty therein." It also promised eventual withdrawal of troops from Outer Mongolia which apparently was effected a few years later, although on March 12, 1936, the Soviet Union concluded with Mongolia a mutual defense arrangement, confirming an understanding of a few years earlier. In reply to Chinese protests, the Soviet Union insisted that this was not intended to encroach upon China's sovereignty.[31]

In fact, China has had no control in Outer Mongolia since 1921, and Soviet influence is important. The British Prime Minister stated in Parliament on May 11, 1936, that "His Majesty's government continue to regard Outer Mongolia as under Chinese sovereignty; and since the conclusion of the Protocol of the 12th of March the Soviet government have declared that in their view the Chinese-Soviet treaty of May, 1924, in which Outer Mongolia was recognized as an integral part of the Chinese Republic, is not infringed by the Protocol, and retains its force."

The interested members of the Family of Nations apparently recognize Outer Mongolia as a part of China, but there is doubt whether the cancellation of the autonomy, which China had granted to Outer Mongolia and which had been recognized in the treaty of 1915, is valid. Thus it appears that *de jure* Outer Mongolia is an autonomous state under Chinese sovereignty or, as the term has been defined, under Chinese suzerainty, but enjoying *de facto* independence.[32]

Tibet. Tibet was conquered in part by China during the Mongol dynasty. Its relations with China during much of this time should be characterized as suzerainty rather than sov-

[31] See *infra*, Chap. 6, note 50.

[32] On the status of Mongolia see Willoughby and Fenwick, *Types of Restricted Sovereignty and of Colonial Autonomy*, Washington, 1919, pp. 59-61; Morse and MacNair, *op. cit.*, pp. 563-7, 665-9; G. M. Friters, "The Development of Mongolian Independence," *Pacific Affairs*, Sept. 1937, pp. 375ff.; Willoughby, *Rights and Interests in China*, pp. 451ff.; Owen Lattimore, *China Year Book, 1938*, pp. 27ff.; Louis Nemzer, "The Status of Outer Mongolia in International Law," *Am. Journ. Int. Law*, July 1939, Vol. 33, pp. 452ff.

ereignty although China has claimed the latter. Chinese interests were maintained through two commissioners or *ambans* at Lhassa.

European states had few contacts with Tibet until 1900 when Russia received Tibetan envoys in St. Petersburg. Great Britain sent the Younghusband mission to Tibet in 1904. This resulted in active hostilities, and an agreement by which Tibet recognized the boundary laid down in the Anglo-Chinese Convention of 1890, agreed on regulations of trade, paid indemnity, and promised not to alienate territory, to permit foreign intervention, or to grant concessions without British consent. China confirmed this arrangement in a treaty of April 7, 1906, in which Great Britain agreed not to annex Tibetan territory or interfere with the administration of Tibet, and China undertook not to permit any other states to interfere with Tibet. Great Britain and Russia recognized the "suzerain rights of China in Tibet" by their treaty of 1907.

China subsequently strengthened its military position in Lhassa, but in 1912, after the outbreak of the Chinese revolution, this force was withdrawn. The Chinese Republic in 1912 declared Tibet, like Mongolia, an integral part of the Chinese Republic and an expedition was sent to Tibet. Great Britain protested that this was in violation of the treaty of 1906. China asserted that it enjoyed police rights under that treaty but abandoned military operations and has exercised no effective influence in Tibet since, though a mission spent some time in Lhassa in 1934. The Dalai Lama proclaimed the independence of Tibet in 1913. A tripartite conference was held in Simla in 1913 and 1914 in which Tibet demanded independence, China sought application of the treaty of 1906, and Great Britain suggested a division of the country into Inner and Outer Tibet. Agreement was not achieved with China, but Great Britain and Tibet concluded a trade agreement in which Great Britain recognized Tibet's autonomy. *De jure,* Tibet is still a part of China with a high degree of autonomy, but *de facto* it enjoys independence in close relations with Great Britain.[33]

Dominions. The Philippine Islands in relation to the United

[33] On status of Tibet see Willoughby, *op. cit.*, Vol. 1, pp. 462ff.; Willoughby and Fenwick, *op. cit.*, pp. 85-6; Morse and MacNair, *op. cit.*, pp. 557-62; Lattimore, *op. cit.*, pp. 38ff.

States[34] and India in relation to Great Britain[35] also conform to the concept of suzerainty, though the word has never been used in either case. The British have preferred the word "dominion" though India does not enjoy full dominion status. Each of them has considerable constitutional autonomy by grant of the parent state, extending in the case of India to capacity to enter the League of Nations and to become an independent party to treaties. The Philippines do not appear to enjoy this capacity

[34] The Philippine Islands were taken by Spain in 1543 and legally transferred to the United States by the treaty of Paris of 1898. An insurrection demanded independence, claiming that the United States had intervened with that object rather than annexation. The insurrection was suppressed in 1901, but American administrators and presidents repeatedly asserted that self-determination of the Philippines was the eventual object of American annexation. The amount of self-government was continually extended, especially by the Jones Act of 1916 and the Tydings-McDuffie Act of March 24, 1934. The latter provided for a Commonwealth period during which the Philippines would enjoy a large degree of autonomy in domestic affairs. This was accepted by the Philippine legislature, a Constitution was framed in accord with it, and the Commonwealth government came into office on November 15, 1935. According to the Tydings-McDuffie Act the Philippines will achieve complete independence on July 4, 1946. Until that time the foreign affairs of the country are controlled by the United States and from the point of view of international law the Philippines are under American sovereignty. See *Blue Book of the Inauguration of the Commonwealth of the Philippines,* Manila, November 15, 1935.

[35] India had contacts with the West since the time of Alexander the Great and began to come into the orbit of modern international law with the Portuguese expedition of 1498. The Portuguese monopolized Indian trade for a century, after which the Dutch, followed by the British and French, established themselves. The British East India Company, chartered in 1600, gained a dominant position in the eighteenth century, driving out rivals, making agreements with native princes and expanding its Indian domain at the expense of the disintegrating Mogul empire. After the Mutiny of 1858 administration was transferred from the company to the crown, and Queen Victoria was proclaimed Empress of India on January 1, 1877. A declaration of August 20, 1917, announced a policy of gradually developing responsible government and the Montague-Chelmsford Act of 1919 sought to inaugurate this policy by establishing an all-Indian assembly and making the provincial governments partially responsible to their assemblies. Further steps were taken in the Act of 1936, passed by the British Parliament after an extensive report by the Simon Statutory Commission and round table conferences with Indian leaders. A federation of British Indian provinces and native states was attempted with ample protection for the conventional rights of the latter and powers of intervening in the provincial and federal governments by the government of India responsible to the Secretary of State for India, a member of the British cabinet. India was admitted to the League of Nations by the Treaty of Versailles and has participated in many international conferences and become a party to many treaties, but major control in conducting foreign relations lies with the British government. See Willoughby and Fenwick, *op. cit.,* pp. 43-50; Oppenheim, *op. cit.,* Vol. 1, p. 175; T. A. Bisson, "A New Constitution for India," *Foreign Policy Reports,* July 17, 1935, Vol. 11, pp. 118ff. J. F. Green, "India's Struggle for Independence," *ibid.,* June 1, 1940, Vol. 16, pp. 70ff.

in international relations, but have more extensive internal self-government.

Both of these entities like Outer Mongolia and Outer Tibet have a considerable autonomy granted by the states which formerly and perhaps still are sovereigns. That status has received some recognition in international law, less in the case of the Philippines than in that of India.

Protectorates. Annam, Tonkin, Laos and Cambodia in French Indo-China; Brunei, Sarawak, British North Borneo, the Federated Malay States and the five unfederated Malay states of British Malaya are all described in official documents as "protectorates" and conform to this conception in international law since their status is based on international agreements between the protecting and the protected states. Their status is recognized in international law in spite of the fact that in most cases the agreements give the protecting state very wide powers, not only over external, but over the internal affairs of the protected state.[36]

"Domestic Dependent Nations." The numerous native states of India and the Dutch East Indies are referred to as protected states, and in most cases agreements are the basis of the relationship, but it appears that these states have not been accorded recognition under international law. From the latter point of view they are entirely within the sovereignty of the so-called "protecting power," perhaps resembling the status which Chief Justice Marshall accorded to the American Indians, "domestic dependent nations."[37] The Shan States of Burma, though practically in much the same situation, are not even referred to as protectorates in British law, but as British territory.

Mandated Territories. The only mandated territory in the Far Eastern area as here defined is that of the North Pacific

[36] Willoughby and Fenwick, *op. cit.*, pp. 40-2.

[37] "Though the Indians are acknowledged to have an unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their rights of possession cease. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." Cherokee Nation vs. Georgia, 5 Peters 1 (1831); Willoughby and Fenwick, *op. cit.*, pp. 50-3.

Islands under Japanese mandate of class C, which permits Japan to administer them "as integral portions of its territory." The mandate, however, conferred upon Japan in 1921, in accordance with Article 22 of the League of Nations Covenant, imposes restrictions in the interests of the natives and of demilitarization, and requires that Japan report annually to the League.[38] The effect of Japan's withdrawal from the League upon this mandate has been much discussed; in practice it appears that the mandate has been regarded as continuing, with the understanding that the obligations of Japan continue. In fact Japan has continued to report annually to the League of Nations upon its administration of this trust,[39] though in October 1938 it declined to send an accredited representative to discuss this mandate with the Permanent Mandates Commission, and the Japanese member withdrew from that Commission. These actions were in pursuance of the Japanese decision to refuse collaboration in the technical work of the League after the Council's recommendation, in September 1938, of certain sanctions because of Japan's aggression in China.[40]

4. *Collective entities.* One collective entity with interests in the Far Eastern area is the League of Nations which is believed to have sovereignty over the mandated territories.[41] Some authorities, however, hold that sovereignty of these territories still rests in a condominium of the Principal Allied and Associated Powers to whom the territories were originally ceded by Article 119 of the Treaty of Versailles.[42] Of the five powers designated by this term (Great Britain, France, Italy, Japan, the United States), the last three are not now members of the League of Nations. The practical difference between these two theories of the location of sovereignty may therefore be important.

The powers with extraterritorial rights in China, collectively known as the "treaty powers"[43] represented by their diplomatic representatives in China, enjoy certain collective rights in the diplomatic quarter of Peking and the International Settlement of Shanghai.[44]

[38] See Q. Wright, *Mandates*, pp. 619-20.

[39] Q. Wright, "The Effect of Withdrawal from the League upon a Mandate," *Br. Y. B. Int. Law*, 1935, pp. 104ff.

[40] League of Nations, *Monthly Summary*, October 1938, p. 279; Royal Institute of International Affairs, *Bulletin of International News*, November 5, 1938, p. 36.

[41] *Supra*, Chap. 3, note 11, and Q. Wright, *Mandates*, pp. 332ff., 530.

[42] *Ibid.*, pp. 319ff.

[43] *Infra*, Chap. 6, note 90.

[44] *Infra*, Chap. 5, notes 13, 15.

CHAPTER V

TERRITORIAL RIGHTS IN THE FAR EAST

The territorial rights within the Far Eastern area may be classified as (1) sovereignty, including sovereignty of home territory and of colonial territory, (2) semi-sovereignty, including suzerainty and autonomy, protection and protectorate, mandatory and mandated territory, (3) jurisdictional restrictions and extensions, including political leases, residential areas, demilitarization, and military administration, and (4) practical controls including spheres of interest and military occupations.

1. *Sovereignty.* Of the sovereign states with territory in the Far Eastern area, the Soviet Union, China, Japan and Siam have home territory; Great Britain, France, the Netherlands, Portugal, the United States, Japan and perhaps China and the Soviet Union have colonial territory. In the case of Japan, a distinction between home and colonial territory is made in the supplement to the Four Power Treaty which states that Karafuto (southern Sakhalin), Formosa, the Pescadores and the islands under Japanese mandate shall be included in the term "insular possessions and insular dominions" entitled to the benefits of the treaty. The Kurile, Lew Chew (Ryukyu), including Amami and Bonin (Ogasawara) Islands, are therefore treated as home territory of Japan, although they were all included among the "insular territories and possessions of Japan" in which the *status quo* in regard to fortifications and naval bases was to be maintained under the Five Power Naval Disarmament Treaty. Karafuto, however, is not included, although it was demilitarized by the Treaty of Portsmouth. Korea appears to be administered by Japan as a colonial area.

China has treated Sinkiang (the New Dominion or Chinese Turkestan) as a colonial area with considerable autonomy although the national government has organized it as a province on a theoretically equal basis with the three provinces of Manchuria, the four provinces of Inner Mongolia, the two provinces of Inner Tibet and the eighteen provinces of China proper.[1]

[1] According to Owen Lattimore (*China Year Book, 1938*, p. 33), "Chinese administration of Sinkiang is a compromise between the 'normal' type of Chinese

All of the territory of the Soviet Union is incorporated in one of the federated republics, but perhaps it is possible to classify as colonies the "Territories" of the Russian Soviet Federated Socialist Republic including the "Far Eastern Territories." These are distinguished from the "Regions," "Autonomous Regions," and "Autonomous Soviet Socialist Republics."[2]

British colonies in the area include Hongkong and part of Kowloon, the Straits Settlements, the island of Labuan near North Borneo, Burma and the neighboring Andaman and Nicobar Islands. Of these, Hongkong and Labuan are presumably among the "insular possessions and insular dominions in the region of the Pacific Ocean" guaranteed by the Four Power Washington Treaty. They were also included in the armament *status quo* provisions of the Five Power Naval Treaty which included the insular possessions of Great Britain, east of the 110th meridian, east longitude, thus excluding the island f Singapore.

The remaining colonies in the area are French Cochin China, the Netherlands Indies, Portuguese Macao and the American Aleutian Islands and Guam. These American islands are within the guarantee of the Four Power Treaty and were also within

province and a special 'colonial organization.'" He also notes that not only Sinkiang, but also Manchuria, Mongolia and Tibet "have throughout history had an intimate relation with China but have never been thoroughly and finally integrated with China. They were for the most part independent or semi-independent of China under the last purely Chinese dynasty, that of the Ming (1368-1644); were then brought into a kind of federative relation with China as a result of the Manchu conquests and alliances (1644-1911), and since the Chinese Revolution have been regarded as possessions of China." *The China Year Book* (p. 1) lists Sinkiang as one of 24 provinces, including the 18 provinces of China proper, 2 of inner Tibet and 3 of Inner Mongolia, distinct from "Outer Mongolia," "Tibet," and "Manchukuo," the latter including the 3 eastern provinces of Manchuria and Jehol of Inner Mongolia.

[2] Constitution of 1936, Arts. 13, 22. Soviet writers, however, insist that Soviet economy has "destroyed any trace of 'colonialism' in its interregional relations." V. Romm, in *The Soviet Union and World Problems*, S. N. Harper, ed., 1935, p. 81. Four of the constituent Republics (Russian S.F.S.R., Tadjik, Kazakh, and Kirghiz S.S.R.s) have frontiers adjacent to China, but they appear to have no status under international law. (*Supra*, Chap. 4, note 2.) It is even less possible to accord any such status to the "Autonomous Soviet Socialist Republics," 17 of which exist in the R.S.F.S.R. (Buryat-Mongol and Yakut A.S.S.R.s in the Far East); to the "Autonomous Regions" of which 6 exist in the R.S.F.S.R. (Oirot, Khakass, and Jewish—Birobidjan A.R.s in the Far East); and one (Gorno-Badakhshan A.R. in Tadjik S.S.R.); to the "Regions" of which 18 exist in the R.S.F.S.R. and 6 in the Kazakh S.S.R.; or to the "Territories" of which 5 exist in the R.S.F.S.R.

the armament *status quo* provisions of the Five Power Naval Treaty, although the latter was terminated in 1936.

2. *Semi-sovereignty.* The status of the territories of the dependent states in this area has already been described in dealing with the status of those states themselves. These states share the sovereignty of the territories they occupy with the states upon which they are dependent. In the case of suzerainty the suzerain is presumed to have sovereignty except insofar as it has granted powers to the vassal or autonomous government. In the protectorates the protected state is presumed to have sovereignty except insofar as it has agreed to relinquish it to the protector. In the mandated territories the League of Nations is presumed to have sovereignty except insofar as it has confirmed the powers of the mandatory. It is believed that the Principal Allied and Associated Powers, to whom the territory was ceded by Germany in the Treaty of Versailles, had a merely transitional sovereignty which ended when these states had instituted the system contemplated by Article 22 of the Covenant, included, it may be noted, in the same treaty by which the cession by Germany was effected.[3]

3. *Jurisdictional restrictions and extensions.* The jurisdictional restrictions in Far Eastern territories apply mainly to certain areas of China, though areas of the Soviet Union, Japan, Siam and Great Britain have been demilitarized by treaty.

Some of these restrictions have been called servitudes—a term which implies a permanent restriction upon the jurisdiction of a sovereign in its territory in the interest of another state.[4] The restrictions here considered are based on treaties or customs establishing relations between states, and terminate upon expiration of the time specified or when alienated by the beneficiary. Thus the holder of a lease in China cannot transfer the lease. The history of both the Russian lease of Port Arthur and the German lease of Kiaochow indicate that when the original lease convention came to an end prior to the time contemplated, the territory reverted to China. Japan claimed the remainder of the Russian lease, not on the basis of Russian consent given in the Treaty of Portsmouth (1905), but on the basis of the Treaty of Peking (1905) with China, and the re-

[3] Q. Wright, *Mandates*, p. 319ff.

[4] G. G. Wilson, *International Law*, St. Paul, 1938, p. 161, Oppenheim, *Int. Law*, 5th ed., Vol. 1, pp. 418ff., Helen Dwight Reid, *International Servitudes, Law and Practice*, 1932, p. 13.

mainder of the German lease, not on the basis of German consent given in the treaty of Versailles, but on the basis of the Twenty-one Demands treaty of 1915 with China, the validity of which, however, China contested. Some of these restrictions therefore lack the element of permanence essential to a servitude.[5] They are limitations on the territorial jurisdiction of one state and in some cases extensions of the jurisdiction of another state beyond its territory, but are not in most cases permanent limitations upon territorial jurisdiction.

Certain general treaty privileges agreed to by China, such as those relating to extraterritorial jurisdiction, property-holding by missionary bodies in the interior and participation in customs administration, qualify Chinese jurisdiction within its territory. Such non-localized qualifications of jurisdiction are dealt with in Chapter VI, sections 5 and 6, of this study, especially insofar as they exist in Sino-Japanese relations.

The localized jurisdictional restrictions and extensions in the Far East can be classified as (1) leased ports, (2) residential areas, (3) demilitarized zones and (4) military jurisdictions.

Leased territories. The leased territories are all based on agreements made by one of the Great Powers with China in 1898. Certain ports were desired for naval and defense purposes, and the agreements transferred all jurisdiction in the port and a defined surrounding area to the lessee for the term of the lease.[6] They originally included the lease of Kiaochow in Shantung province to Germany for ninety-nine years, of Port Arthur and Dalny in the Liaotung Peninsula of Manchuria to Russia for twenty-five years, of Kwangchouwan opposite Hainan Island to France for ninety-nine years, of Kowloon extension to Great Britain for ninety-nine years, and of Weihaiwei across the Chihli Gulf from Port Arthur to Great Britain for "so long a period as Port Arthur shall remain in the occupation of

[5] Reid, *op. cit.*, p. 19.

[6] For text of lease conventions see Willoughby, *Foreign Rights and Interests,* Vol. 1, Chap. 17; and MacMurray, *op. cit.* The United States and the lessee powers other than Japan held that since all Chinese jurisdiction had been transferred, extraterritorial privileges of third states would not apply within leased areas during the duration of the leases. *U. S. Foreign Relations, 1900,* pp. 387ff. In U. S. vs. A. W. Smith, the U. S. court for China on March 2, 1925, supported this opinion, reversing a ruling of the U. S. Commissioner which had held that China could not diminish American extraterritorial rights based on treaty by a later treaty leaving the Liaotung area to Japan. Willoughby, *op. cit.,* Vol. 1, pp. 480ff.

Russia." As a result of Washington Conference discussions, Kiaochow was restored to China by a China-Japanese treaty in 1922 and Weihaiwei was restored on October 1, 1930, in pursuance of an Anglo-Chinese treaty of April 18, 1930.[7] China considered the Liaotung (Port Arthur) lease to have expired in 1923, but Japan, relying on the extension of the lease to ninety-nine years in the Twenty-one Demands treaty of 1915, the validity of which China contested, declared at the Washington Conference that it had no intention of relinquishing this lease. Great Britain declared on this occasion that the Kowloon extension was necessary for the defense of Hongkong. France professed willingness to restore Kwangchouwan in connection with the general restoration of Chinese leases.[8] In fact, however, the lessees continue in control of the Liaotung lease, called by Japan, Kwantung, of the Kowloon extension, and of Kwangchouwan.

Residential areas. The residential areas exist in Chinese ports which have been opened to commerce, and legal justification for them is sought in commercial treaty provisions like the following from Article III of the Sino-American treaty of 1903:

> Citizens of the United States may frequent, reside, carry on trade, industries and manufactures, or pursue any lawful avocation, in all the ports or localities of China which are now open or may hereafter be opened to foreign residence and trade; and, within the suitable localities at those places which have been or may be set apart for the use and occupation of foreigners, they may rent or purchase houses, places of business, and other buildings, and rent or lease in perpetuity land and build thereon.

Under the influence of most favored nation clauses and extraterritoriality, many of the powers acquired areas pursuant to such general authorizations over which they exercise a very considerable jurisdiction to the exclusion in large measure of Chinese jurisdiction. In law the qualifications of Chinese jurisdiction are more limited and are thus described by Willoughby:[9]

> The significance of a concession or settlement at a treaty port, then, comes down to this: That permission is given by the Chinese government to the foreigners concerned, to set up and maintain local governmental, or, more exactly, local administrative agencies for police purposes, sanitation, making of roads, building regulations, and so forth. The administrative organs, created for carrying out these public purposes, levy taxes, the

[7] *Br. and For. St. Pap., 1930,* Vol. 132, pp. 222ff.
[8] Willoughby, *op. cit*, Vol. 1, Chap. 18, pp. 485ff.
[9] *Ibid.*, Vol. 1, pp. 500-3.

proceeds of which, must, however, be devoted exclusively to the performance of these local administrative tasks. They may not be levied for any other purpose.

In these respects the governing bodies in the settlements and concessions very much resemble the city governments of America. They are, however, distinguished from them in the important respect that, as has been already suggested, they are administrative rather than political bodies. They have no standing as agencies, for local purposes, of the sovereign state from which, by municipal charter, American cities derive legal power to take action and to issue rules that have the force of law.

While they have authority to maintain police forces, the members of which may make arrests, they have no power to establish courts for the enforcement of the administrative rules that they issue—all judicial proceedings must be before the consular courts. . . .[10]

There is, indeed, great difficulty in finding a satisfactory logical basis for ascribing any legally controlling force to the rules and regulations issued by the governing authorities of the concessions and settlements, for they are not issued in pursuance of a delegated legislative authority derived from a sovereign legislative source. This difficulty was recognized by the American Secretary of State, who, writing to the American Minister at Peking, March 7, 1887, said:

"The question which you suggest as to the authority of the Consul General at Shanghai to enforce the ordinances of the municipality against citizens of the United States is not without difficulty. . . . In the United States, where government is reduced to a legal system, these powers of local police rest on charters granted by the supreme legislative authority of the state; but it is not difficult to conceive of a case in which a community outside of any general system of law might organize a government and adopt rules and regulations which would be recognized as valid on the ground of the right of self-preservation, which is inherent in people everywhere. In this light may be regarded the municipal ordinances of Shanghai. The foreign settlement not being subject to the laws of China, and the legal systems of the respective foreign powers represented there being not only dissimilar inter se, but insufficient to meet the local needs, it becomes necessary for the local residents interested in the preservation of peace and order to supply the deficiency."

The legal bases and powers of local officials differ in each of these residential areas, but they have been classified into four types.[11]

[10] Or, in the case of Englishmen, before the Supreme Court of China, or of Americans, before the United States Court for China.

[11] *Ibid.*, Vol. 1, pp. 504ff.; Richard Fetham, *Report to the Shanghai Municipal Council*, 1931, Vol. 1, p. 27. A list of the existing concessions and settlements in China is printed in *China Year Book, 1939*, p. 103. A classification of 40 concessions and settlements which existed before the World War indicates that they extended to 22 Chinese cities and consisted of 4 international settlements (Shanghai, Amoy, Changsha, and Tsinan), 10 Japanese, 10 British, 6 Russian, 4 French, 2 German, and one Belgian, Italian, Austrian and American concessions. (Escarra, *Le Régime*

(1) In the "concessions" which were the commonest type the Chinese government leased the area in perpetuity to a foreign power which then sublet lots to the residents. The consul, sometimes assisted by a local body elected by the rate payers, is the chief official of the area and authorizes the essential municipal activities therein. Many of these concessions have been relinquished by agreement of the lessee and China since 1927, though in most cases the agreement provided that China would continue to recognize a residential area of one of the subsequent classes.[12]

(2) In the international and French "settlements" in Shanghai the Chinese government set apart certain areas for foreign residence without express lease to the foreign governments. Individual residents, therefore, get deeds to an interest in the lands they occupy from Chinese authorities. In the case of the French settlement, the French consul has supervisory authority, but in the case of the international settlement, the Shanghai municipal council, elected by the rate payers, functions under supervision of the diplomatic corps accredited to China. Extensive claims in regard to defense, neutrality and judicial administration in derogation of Chinese jurisdiction have grown up in practice.[13] The international settlement at Amoy is similar.

des Concessions Étrangères en Chine, Académie de droit international, 1929 (II), Vol. 27, p. 39.) Escarra, utilizing official Chinese classifications, groups the first two classes together as "concessions" (*tsou kiai*) and the second two together as "trade marts" (*chang-feou*), both of which he distinguishes from "open ports" (*t'ong chang k'eou ngan*) which are open to foreigners, but where no foreign residential area has been established. He points out that the distinction often made in the English language between "concessions" and "settlements," according as the source of the individual landholder's lease is a foreign consul or the Chinese authorities, has little practical significance. A more significant distinction, he suggests, may be made between "national concessions" (*tchouan cho tsou kiai*) and "international settlements" (*kong kong tsou kiai* or *wan kouo tsou kiai*). He also notes that the older residential areas were based on the personal status of foreigners which made it convenient for the Chinese government that they reside together, while the later ones tended to be based on territorial jurisdiction desired by foreign governments. (*Ibid.,* pp. 10-12, 30-40.)

[12] Blakeslee, *The Pacific Area,* p. 44.

[13] See elaborate *Report by Mr. Justice Fetham to the Shanghai Municipal Council,* 1931; Ching-lin Hsia, *The Status of Shanghai,* Shanghai, 1929; A. M. Kotenov, *Shanghai, Its Mixed Court and Council,* 1925, and *Shanghai, Its Municipality and the Chinese,* 1927; M. O. Hudson, "International Problems at Shanghai," *For. Aff.,* Oct. 1927, Vol. 6, pp. 75ff.; Willoughby, *op. cit,* Vol. 1, pp. 511ff. Though usually referred to as "the French Concession," this area has the legal character of a "settlement."

(3) In a few cases, Chefoo, for example, there is neither a "concession" to a foreign government nor explicit Chinese provisions for a "settlement," but tacit understanding that a certain area (in Chefoo, the promontory of Yentai) was reserved to foreigners who proceeded to occupy and organize it. The functioning of local authorities is, therefore, based not on any document, but merely on custom and practice.

(4) In a few cases, Yochow, for instance, the Chinese government organized a residential area for foreigners and administered it with help from the local community. Thus there is not even a prescriptive claim to immunity from Chinese jurisdiction.

It is clear that these residential areas, even the first class, are not in law based upon any restriction of Chinese jurisdiction, much less of Chinese sovereignty, but merely upon permission given by China to foreign communities to exercise certain functions of self-government in Chinese territory. In recognition of this, the judicial power which had grown up in some of the residential areas, especially Shanghai, in excess of the jurisdiction which consuls have over their nationals under the general terms of extraterritoriality treaties, has been relinquished since the Washington Conferences, and this judicial power over Chinese has been restored to China.[14]

Somewhat similar to the residential areas but involving general exemption from Chinese jurisdiction is the legation quarter at Peking, based upon Article VII of the Boxer Protocol of 1901, by which

> the Chinese government has agreed that the quarter occupied by the legation shall be considered as one especially reserved for their use and placed under their exclusive control, in which Chinese shall not have the right to reside and which may be made defensible.

The diplomatic corps has provided for the administration of this area by a protocol of June 13, 1904.[15]

The extensive American rights in the island of Yap under Japanese mandate may in a broad sense be said to constitute this island an American residential area. By the Japanese-Ameri-

[14] The Shanghai mixed court was replaced by a provisional Chinese Court on January 1, 1927, and definitive arrangements restoring Chinese jurisdiction went into effect on April 1, 1930. Fetham, *op. cit.*, Vol. 1, pp. 171-5; Morse and MacNair, *op. cit.*, p. 727. See also comments by Willoughby, *op. cit.*, Vol. 1, p. 534.

[15] Robert M. Duncan, *Peiping Municipality and the Diplomatic Quarter*, Yenching University, 1933.

can treaty of February 11, 1922, negotiated during the Washington Conference, the United States consented to the Japanese administration of the North Pacific islands under League of Nations mandate with specification of certain conditions including:

> The United States and its nationals have free access to the island of Yap on a footing of entire equality with Japan or any other nation and their respective nationals in all that relates to the landing and operation of the Yap-Guam cable or of any cable which may hereafter be laid or operated by the United States or by its nationals connecting the island of Yap.

Rights respecting radio and telegraphic communications, residence, uncensored use of cables and radios, expropriation of land needed for electrical communications, are specified in detail.

Demilitarized zones. Demilitarized zones exist in Russian and Japanese territory on Sakhalin Island, in Chinese and British territory along the Tibetan-Burmese frontier, in Siamese and French territory on the Mekong river frontier, in the territory under the mandate of Japan, and in Chinese territory in the leased ports, the Peking legation quarter, Taku and the communications between Peking and the sea. A resolution at the Washington Conference favored the general reduction of Chinese armed forces,[16] and in the truces ending hostilities around Shanghai in 1932 and hostilities in North China in 1933 and 1935, China agreed temporarily not to move troops in certain areas. These truce arrangements, however, cannot be considered as establishing a permanent territorial status.[17] In fact, the same appears to be true of the Boxer Protocol restrictions apart from that of the legation quarter. Restrictions upon

[16] Resolution No. 9.

[17] For Shanghai truce, May 5, 1932, Tangku truce, May 31, 1933, and Ho-Umetzu agreement, June 10, 1935, see Chap. 3, notes 12, 13, *supra*. The Japanese interpreted the Tangku truce as making "the north China District south of the Great Wall a demilitarized buffer zone between China and Manchoukuo" and "the implicit virtual recognition of the independent existence of Manchoukuo by China." (*Manchoukuo Year Book, 1934*, p. 153.) After hostilities had broken out in North China and the Shanghai area in July and August 1937, the Japanese alleged that China had violated these "demilitarization" provisions. (See statement by Japanese Foreign Minister Hirota, Sept. 5, 1937; Japanese Consul General at Shanghai, Sept. 23, 1937; Japanese Foreign Office, Oct. 19, 1937, Oct. 27, 1937. *China Year Book, 1938*, pp. 366, 369, 378.) But the League of Nations and the Brussels Conference declined to accept this view. (*Ibid.*, pp. 374, 380.) See also Chap. 3, note 12, *supra*.

the movement of Chinese troops in the Tientsin railway zone are said to have been relaxed as early as 1906, and on January 26, 1912, the diplomatic corps resolved that

> both Chinese Imperial and Revolutionist troops are at liberty to use the railway line and adjoining piers and wharfage for the purpose of transportation, landing, or embarkation, and will not be interfered with.[18]

Demilitarization of the Japanese mandated islands is similar to the provisions applicable to other mandated territories, and merely forbids "the military training of the natives, otherwise than for purposes of internal police and the local defense of the territory" and the "establishment of military or naval bases" or "the erection of fortifications." The reciprocal boundary demilitarization provisions forbid fortifications and troops within the zone beyond those necessary for local police and resemble numerous local demilitarization agreements in various parts of the world.[19]

The Siamese frontier demilitarization applied only to the Siamese side of the frontier under the treaty of 1893, but was made applicable to both sides of the frontier by the treaty of 1926 which also changed the boundary from the west bank of the Mekong to the mid-channel. The restrictions applicable to Chinese territory do not apply reciprocally to the territory of the two states as do the boundary demilitarizations, and also are accompanied by permission for the entry of foreign military forces into those areas.

Military administration. China alone of the Far Eastern powers appears to be obliged to permit foreign military forces in portions of its territory. These areas include the leased ports, the Peking-Taku area and perhaps certain concessions, settlements and railroad zones. There appear to be no limits to the number of military or naval forces which powers holding leases may maintain in their leased territories. The exchanges of notes of July 15, 1902, explanatory of Articles VII-IX of the Boxer Protocol of September 7, 1901,[20] specified the areas from which

[18] MacMurray, *op. cit.*, Vol. 1, p. 318; Shuhsi Hsu, *The Boxer Protocol and Japanese Aggression,* Council on International Affairs, Nanking, Information Bulletin, Aug. 18, 1937, Vol. 4, p. 177.

[19] See list of 47 such arrangements, D. P. Myers, *World Disarmament,* World Peace Foundation, Boston, 1932, pp. 52ff.

[20] MacMurray, *op. cit.*, Vol. 1, p. 316.

Chinese forts should be razed and troops withdrawn,[21] the areas within which foreign troops might be stationed,[22] the nature of the activity of these troops,[23] and the purposes for which they might be used.[24] While the number of troops which any power might maintain within these areas was not specified, the limited nature of their functions was in practice deemed to limit the number to 2,000 for any power, which should not be increased without consent of the diplomatic corps.[25]

Apart from the explicit provisions of the Boxer Protocol and the leased ports with respect to foreign military forces in Chinese territory, certain governments have maintained the right to have warships in Chinese waters on the basis of general treaty provisions such as Article 52 of the Anglo-Chinese treaty of 1858,[26] which, however, goes little beyond a recognition of the normal courtesy by which states permit foreign warships to visit their ports for fuel, provisions and repairs. It is questionable whether it warrants the practice of permanently maintaining gunboats on Chinese rivers.[27]

[21] Legation quarter of Peking, Tientsin, twenty Chinese *li* (6 2/3 miles) surrounding that city, and 2 miles on either side of the Peking-Tientsin Railway, with exception of a Chinese viceroy's guard of 300 in Tientsin and an efficient river police even where the river extends within the railway zone.

[22] The Legation quarter, Hwang-tsun, Lang-fang, Yang-tsun, Tientsin, Chun-liang Ch'eng, Tangku, Lu-tai, Tang-shan, Lan-chou, Chang-li, Ch'in-wang-tao, shan-hai-kwan, and two miles on each side of the Peking-Tientsin railway.

[23] "They will have the right of carrying on field exercises and rifle practice, and so forth, without informing the Chinese authorities, except in the case of *feux de guerre*."

[24] To defend the legations and to maintain "open communication between the capital and the sea," but "military control would only refer to offenses against the railroad, the telegraph lines, or against the Allies or their property."

[25] Shuhsi Hsu, *op. cit.*, p. 175; and *Foreign Affairs Review*, Nanking, April 1937.

[26] "British ships of war, coming for no hostile purpose, or being engaged in the pursuit of pirates, shall be at liberty to visit all ports within the dominions of the Emperor of China, and shall receive every facility for the purchase of provisions, procuring water, and, if the occasion require, for the making of repairs. The commanders of such ships shall hold intercourse with the Chinese authorities on terms of equality and courtesy." Article 9 of the Sino-American treaty of 1858 is similar. Secretary of State Hull asserted on December 4, 1937, that "the authority for stationing naval vessels of the United States in Chinese waters is found in the Sino-American treaty of 1858 and in somewhat similar provisions of treaties between China and other foreign powers, which provisions inure to the benefit of the United States through most favored nation treatment." (*Department of State Press Releases*, Dec. 11, 1937, Vol. 17, p. 417.)

[27] The United States, however, expressed the opinion in 1903, "Our gunboats may visit the inland ports of China, including those which are not treaty ports." (*Foreign Relations, 1903*, pp. 85ff.) And in its note to Japan of December 14, 1937, on the *Panay* incident, the United States asserted "these American vessels were in

Russia and, later, Japan claimed the right to station railway guards in and to administer the area along the Chinese Eastern Railway and the South Manchuria Railway in Manchuria. This claim was based on a clause in the original concession by China to the Russo-Chinese bank on September 8, 1896, which read:[28]

> The company [the Chinese Eastern Railway Company] will have the absolute and exclusive right of administration of its lands.

China, supported by the United States, Great Britain and Japan, contended that this referred only to economic administration and did not warrant political jurisdiction or military police. Japan, however, later claimed to fall heir to the right as interpreted by Russia, when it acquired the southern portion of this railway by the Treaty of Portsmouth in 1905, and the problem was continuously discussed but no agreement was reached.[29] By agreement of November 5, 1937, however, Japan transferred administrative rights in the railway zone to "Manchukuo."[30]

Foreign police and military forces have been stationed in the various residential areas, particularly in Shanghai,[31] and the right has been claimed to maintain "consular police" to pre-

the Yangtse River by uncontested and uncontestable right." (*Press Releases*, Dec. 18, 1937, Vol. 17, p. 448; Blakeslee, *op. cit.*, p. 58; Quigley and Blakeslee, *The Far East*, World Peace Foundation, Boston, 1938, p. 171.)

[28] MacMurray, *op. cit.*, Vol. 1, p. 76. The Russo-Chinese bank, chartered December 1895, was merged in 1900 with the Banque du Nord and became the Russo-Asiatic Bank, which, though nominally a Russian corporation, had among its founders four of the principal banks of Paris and certain French financial leaders. (Morse and MacNair, *op. cit.*, p. 415.)

[29] Blakeslee, *op. cit.*, p. 108; C. Walter Young, *Japan's Jurisdiction in the South Manchuria Railway Areas*, Baltimore, 1931; *Lytton Report*, pp. 51-2; Harold Parlett, *A Brief Account of Diplomatic Events in Manchuria*, Royal Inst. of Int. Aff., London, 1929, p. 28.

[30] *Bulletin of International News*, Nov. 13, 1937, Vol. 14, p. 40; *Contemporary Manchuria, A Bi-Monthly Magazine*, Jan. 1938, Vol. 1, pp. 8ff.

[31] *Supra*, note 13. China stated at the Washington Conference: "Whatever may be the practice of nations under international law as to the sending of troops into a foreign State for the protection of their nationals, it is recognized by the civilized world that the sending of such troops is, and rightfully can be, only a temporary measure in order to meet emergencies that threaten imminent danger to the lives and property of the nationals of the State taking such action, and, upon the passing of such emergency, the troops sent should be immediately withdrawn. It is furthermore recognized that the obligation to make such withdrawal should not, as a general principle, be made dependent upon the inquiry into the domestic conditions of the country into which such troops are sent, but, in every case, their retention should depend upon clearly evident conditions of disorder in the localities where such troops are stationed such as to make demonstrable the inability or indisposition of the local territorial sovereignty

serve order among foreigners in China as a corollary to extra territorial jurisdiction.[32]

During the Washington Conference, China and Japan stated their positions in regard to foreign troops in China,[33] and by a resolution the powers

> declared their intention to withdraw their armed forces now on duty in China without the authority of any treaty or agreement whenever China shall assure the protection of the lives and property of foreigners in China.

An inquiry as to the existence of conditions necessitating the continuance of troops in certain areas was also provided in this resolution.[34] The gap between the *de jure* and *de facto* conditions in regard to foreign troops in China has, however, never been wider than it is today.

4. *Practical controls.* It is doubtful whether the "spheres of interest" and "military occupations" in the Far East, important as they may be in practice, have a basis in law which constitutes them territorial rights, though such interests may acquire legal status if long acquiesced in or generally recognized, as in the case of the American Monroe Doctrine[35] and the British occupation of Egypt prior to 1914.[36]

to afford adequate protection to the lives and property of the nationals of the State sending troops." The Pan American Convention on the rights and duties of states, to which the U. S. is a party, goes further in declaring that "no state has the right to intervene in the internal or external affairs of another." (*U. S. Treaty Series*, No. 881, Art. 8.)

[32] *Lytton Commission Report*, p. 53.

[33] China contended: "The proposition surely stands self-evident that, if a nation asserts a right to maintain troops, or guards, or police, or to erect and operate systems of communication upon the soil of another State, whose sovereignty and independence and territorial and administrative integrity it has just solemnly affirmed and obligated itself to respect, upon that State would lie a heavy burden of proof to justify so grievous an infringement of the rights of exclusive territorial jurisdiction which international law as well as a general sense of international comity and justice, recognize as attaching to the status of sovereignty and independence." Willoughby, *op. cit.*, Vol. 2, p. 857. Japan insisted on treaty rights in regard to the South Manchuria Railway guards but professed willingness to withdraw them when China police could assume protection. It emphasized the practical utility of consular police in connection with extra-territorial jurisdiction over Japanese and "protection for the Chinese communities which at present their own organization fails to provide." (Willoughby, *op. cit.*, Vol. 2, pp. 859, 863.)

[34] Resolution No. 6, Malloy, *Treaties of the United States*, Vol. 3, p. 3133; Willoughby, *op. cit.*, Vol. 2, pp. 856ff.

[35] This was given some general recognition in the wide acceptance of the American reservation to The Hague Convention on Pacific Settlement of the 1899 and 1907 Conferences, and Art. 21 of the League of Nations Covenant.

[36] This occupation, which began in 1882, was generally acquiesced in after the French acceptance of it in connection with the Anglo-French entente of 1903.

Spheres of interest. A sphere of interest refers to a territory within a recognized state, or a region including one or more recognized states within which another state claims special privileges, usually of an economic, though sometimes of a political character. It differs from a sphere of influence in that the latter usually refers to an area not claimed by any recognized state, but which a state, not yet ready to assume the responsibilities of annexation, claims a prior opportunity to annex by occupation.[37]

Spheres of interest have been claimed in Siam and in China. The Siamese spheres of Great Britain and France were designated "spheres of influence," and perhaps that term more accurately indicates their nature than the term "spheres of interest." They rested on an Anglo-French agreement in 1896, modified in 1907, renouncing military or economic penetration in the central area of Siam and recognizing each other's respective spheres of influence in the remaining areas of Siam adjoining their territories.[38] These spheres for the most part became protectorates of the country claiming them and were thus permanently separated from Siam.[39]

Spheres of interest, usually implying non-alienation by the sovereign (except perhaps to the holder of the sphere), and special (sometimes exclusive) privileges of economic, particularly of railroad, development have been claimed in China by virtue of (1) agreements between two states other than China by which one renounced interest in the other's sphere,[40] or (2) recognized the other's special interest in that sphere;[41] (3) by

[37] For various definitions see Willoughby, *op. cit.*, Vol. 1, pp. 132, 351.

[38] MacMurray, *op. cit.*, Vol. 1, p. 54.

[39] See Franco-Siamese Treaties of Feb. 14, 1904, and March 1907, and Anglo-Siamese treaty of March 10, 1909. Morse and MacNair, *op. cit.*, pp. 541-4.

[40] As in the Anglo-German agreement of April 20, 1898, and the Anglo-Russian agreement of April 28, 1899. MacMurray, *op. cit.*, Vol. 1, pp. 152, 204. See also C. Walter Young, *Japan's Special Position in Manchuria*, p. 58, and various Russo-Japanese secret treaties from 1907 to 1916. *Ibid.*, pp. 73ff. The "spheres of influence or interest" which the United States had referred to in the Hay notes of 1899 were based on such agreements. The object of the notes was to assure "the open door" in such spheres. MacMurray, *op. cit.*, Vol. 1, pp. 223ff.

[41] Such provisions were in some of the Russo-Japanese treaties referred to above. See also Lansing-Ishii agreement of November 2, 1917, between Japan and the United States, in which the latter recognized "that territorial propinquity creates special relations between countries, and consequently, the Government of the United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous." Willoughby, *op. cit.*, Vol. 1, p. 361; and Q. Wright, "Territorial Propinquity," *Am. Journ. Int. Law*, July 1918,

virtue of an agreement or declaration by which China promised another state not to cede jurisdiction or concessions in the latter's sphere;[42] (4) by virtue of the possession by a state or its nationals of a body of economic or other rights in an area;[43] (5) by virtue of a unilateral declaration presumably acquiesced in or recognized, asserting a superior interest in an area or region.[44]

The claims to spheres of interest in China might have developed into claims to annexation in 1900 had it not been for the general agreement to respect the territorial integrity of China before the Boxer Protocol negotiations.[45] These claims have tended to an impairment of the territorial integrity of China since, especially in the Japanese invasions of Manchuria and North China. China and the United States have never recognized that legal implications beyond the express terms of treaties or concessions could be drawn from the assertion of such spheres, or that treaties could impair the legal rights of states not parties thereto.[46]

Vol. 12, pp. 519ff. This agreement was canceled on April 14, 1923. Willoughby, Vol. 1, p. 401.

[42] As in the non-alienation declarations of 1897 and 1898 by which China respectively pledged Great Britain, France and Japan that she would not alienate the Yangtze region, Hainan, the area bordering Tonkin and Fukien. MacMurray, *op. cit.*, Vol. 1, pp. 98, 104, 123, 126; Willoughby, *op. cit.*, Vol. 1, p. 137.

[43] This has been an important element in Japan's claim to a sphere in Manchuria. (See Willoughby, *op. cit.*, Vol. 1, pp. 135-6.) As indicated in the following Japanese declaration in 1911: "Japan possesses in the region of southern Manchuria special rights and interests, and while she is fully prepared in the future as in the past to respect the right of others, she is unable to view with indifference measures which tend not only to menace those special rights and interests but to place her subjects and institutions at a disadvantage as compared with the subjects and institutions of any other country." The American position as expressed in 1917 by Minister Reinsch was: "while Japan has many specific concessions in southern Manchuria her position in that region is to be understood as made up of the sum of such specific concessions; in other words, that privileges could be claimed not by virtue of a so-called 'special position,' but only under some specific grant," (Young, *op. cit.*, pp. 175, 205.)

[44] As in repeated Japanese declarations of a special interest in Manchuria by virtue of economic investments (*supra*, note 43), territorial propinquity (*supra*, note 41), "the right to live," "an economic life-line," strategic necessity, "an Asiatic Monroe Doctrine," etc. See Young, *op. cit.*, pp. 298-371, and his quotation of Viscount Ishii's *Mémoires*, pp. 372ff.; Willoughby, *op. cit.*, Vol. 1, pp. 360ff.

[45] MacMurray, *op. cit.*, Vol. 1, p. 308; Moore, *Digest of International Law*, Vol. 5, p. 482.

[46] With the possible exception of the American admission in the Lansing-Ishii agreement. *Supra*, notes 43, 44. See China's note on this occasion and American note on occasion of 21 Demands treaty. Willoughby, *op. cit.*, Vol. 1, pp. 237, 363.

At the Washington Conference China stated this position with the support of the United States, and soon after the United States terminated the Lansing-Ishii agreement which had been made with Japan in 1917.[47] Great Britain renounced spheres of interest in China at this time,[48] and the Nine Power Treaty provided, in addition to the general provisions assuring respect for the sovereignty, independence, territorial and administrative integrity of China, that:

> the contracting powers, other than China, agree to refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly states, and from countenancing action inimical to the security of such states.
>
> That they will not seek, nor support their respective nationals in seeking (a) any arrangement which might purport to establish in favor of their interests any general superiority of rights with respect to commercial or economic development in any designated region of China; (b) any such monopoly or preference as would deprive the nationals of any other power of the right of undertaking any legitimate trade or industry in China, or of participating with the Chinese government, or with any local authority, in any category of public enterprise, or which by reason of its scope, duration, or geographical extent is calculated to frustrate the practical application of the principle of equal opportunity.
>
> The contracting powers agree not to support any agreements by their respective nationals with each other designed to create spheres of influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory.

These provisions were designed to abolish any past or future claims to spheres of interest. Japan, according to Willoughby, did not accept the last of these provisions "with any great eagerness,"[49] and her subsequent behavior has been based on the assumption of a sphere of interest in Manchuria, North China, Fukien province, and, in fact, by the Amau statement of April 18, 1934, in the whole of China if not the Far East.[50] In this respect the *de jure* and *de facto* situations are out of harmony.

Military occupations. Jurisdictional extensions discussed under the head of military administration refer to military rights to which one state is entitled in the territory of another by treaty or other instrument of international law, and are to be distinguished from military occupations of territory based

[47] *Supra,* note 41 and Chapter I, note 23.

[48] Willoughby, *op. cit.,* Vol. 1, pp. 355.

[49] *Op. cit.,* p. 357.

[50] Akagi, *op. cit.,* pp. 538ff. See C. C. Hyde, *Am. Journ. Int. Law,* July 1934, Vol. 28, pp. 431ff.

solely upon superior force. The latter, like the spheres of interest in China today, is a *de facto* rather than a *de jure* situation, but military occupation is regulated by international law whether it occurs in the course of war or of hostilities short of war.

The second Hague Convention of 1899 on the laws and customs of war to which both China and Japan are parties (China is not a party to the fourth convention of 1907 which, however, is almost identical in these articles) provides:

> Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and is in a position to assert itself.
>
> Article 43. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in its power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.
>
> Article 44. Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited.
>
> Article 45. Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.

Succeeding articles provide for the protection of family honor and rights, private property, religious convictions, and limit the occupant's action in levying taxes, making requisitions and contributions, imposing penalties, sequestrating or otherwise utilizing property of various kinds. The occupant acquires no permanent rights in the territory, his prerogative being limited to the duration of effective occupation.

When military invasion or attack, whether or not resulting in occupation, has been undertaken in violation of a definite obligation owed to the state whose territory is occupied, the latter seems to have claims for all the damages and losses suffered by itself or its population as a result of this occupation.[51] While it is not proposed to examine here the alleged justification of Japanese invasion of Chinese territories in 1931 and since,[52] it may

[51] Q. Wright, "Responsibility for Losses in Shanghai," *Am. Journ. Int. Law*, July 1932, Vol. 26, pp. 586-90; and *infra*, Chapter VI, note 42.

[52] See W. W. Willoughby, *Sino-Japanese Hostilities and the League of Nations*, Baltimore, 1935, Chaps. 21-5; Q. Wright, "The Manchurian Crisis," *Am. Pol. Sci. Rev.*, Feb. 1932, Vol. 26, pp. 45-76; J. Shinobu, *International Law in the Shanghai Conflict*, Tokyo, 1933, Chaps. 1, 2; Shuhsi Hsu, *The North China Problem*, Shanghai, 1937; *How the Far Eastern War Was Begun*, Shanghai, 1938; *The War Conduct of the Japanese*, Shanghai, 1938; *Japan and Shanghai*, Shanghai, 1938; E. S.

be noted that the League of Nations and the United States in 1932 and again in 1937 declared these justifications were inadequate and that Japan had violated obligations under the Pact of Paris, and, prior to her withdrawal from the League in 1935, under the Covenant.[53] Thus the above-stated principle seems applicable to the Japanese bombardments, invasions, and occupations in Manchuria and other parts of China.

Rubinow, "Sino-Japanese Warfare and the League of Nations," *Geneva Studies,* Vol. 9, No. 3, May 1938; Mousheng Hsitien Lin, *International Law and the Undeclared War,* China Institute in America, N. Y., 1937; Foreign Affairs Association of Japan, *How the North China Affair Arose,* Tokyo, 1937; Japanese Chamber of Commerce of New York, *The Sino-Japanese Crisis,* 1937.

[53] *Infra,* Chap. VI, note 59. Statement by Acting Secretary Sumner Welles, April 23, 1938, *Dept. of State Press Releases,* April 30, 1938, p. 511; Q. Wright, "The Denunciation of Treaty Violators," *Am. Journ. Int. Law,* July 1938, Vol. 32, pp. 526ff.

CHAPTER VI

LEGAL RELATIONS IN THE FAR EAST

The legal relations involved in the conflict in the Far East are primarily those between China and Japan, secondarily those of each of these states with the other members of the Family of Nations with territory in the Far East, and to a lesser degree the relations of China and Japan to the remaining members of the Family of Nations.

1. *Customary, legislative and contractual relations.* These legal relations are defined by (1) rules of general international law which bind equally all members of the Family of Nations, (2) multipartite conventions which bind only those states which have ratified them, and (3) bipartite conventions which bind only the two parties.

Text writers have often asserted that the members of the Family of Nations have a legal interest in the observance of general international law by each one of them,[1] and occasions can be cited where a state has protested against an illegal act of

[1] "If no association of men can be maintained without law, as Aristotle showed by his remarkable illustration drawn from brigands, surely also that association which binds together the human race, or binds many nations together, has need of law. . . . Aristotle takes sharply to task those who, while unwilling to allow any one to exercise authority over themselves except in accordance with law, yet are quite indifferent as to whether foreigners are treated according to law or not. . . . Truly it is more honorable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind. . . . Victoria, Vazquez, Azor, Molina and others, in justification of war seem to demand that he who undertakes it should have suffered an injury either in his person or his state, or that he should have jurisdiction over him who is attacked. For they claim that the power of punishing is the proper effect of civil jurisdiction, while we hold that it also is derived from the law of nature." Hugo Grotius, *De Jure Belli ac Pacis*, Carnegie Ed., 1925, Prolog. sec. 23, II, c. 20, sec. 40, par. I, 4. See also c. 25, sec. 6. "The existence of a right to oppose acts contrary to law and to use force for that purpose when infractions are sufficiently serious, is a necessary condition of the existence of an efficient international law." W. E. Hall, *International Law*, Sec. 92. See also Vattel, *Droit des Gens*, Prelim., sec. 22; Creasy, *First Platform of International Law*, London, 1876, p. 44; Amos, *Jurisprudence*, 1872, pp. 411, 456; Hyde, *International Law*, Vol. I, pp. 119-28; Westlake, *International Law*, Vol. I, pp. 318, 320; Wright, "The Outlawry of War," *Am. Journ. Int. Law*, Jan. 1925, Vol. 19, p. 92.

another state which did not directly affect its material interests on the ground of general concern in the observance of law.[2] Such occasions, however, are rare. In general, states follow the practice of manifesting concern at the violations of general international law only when their own material interests are affected. This principle was pointed out by Elihu Root in an address in 1915.[3]

> Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. There has been no general recognition of the right of other nations to object. There has been much international discussion of what the rules of law ought to be and the importance of observing them in the abstract, and there have been frequent interferences by third parties as a matter of policy upon the ground that a specific, consequential injury to them might result from the breach, but, in general, states not directly affected by the particular injury complained of have not been deemed to have any right to be heard about it. It is only as disinterested mediators in the quarrels of others or as rendering good offices to others that they have been accustomed to speak at all.

With respect to bipartite treaties, this rule is more definitely recognized than in the case of general international law. One party to a treaty can, of course, protest if the other violates the treaty, because such a violation would always constitute a legal injury. But a third state, unless it has expressly related itself to such a treaty as an adherent or guarantor, is not entitled to protest or to take other action to compel parties to the treaty to observe it.[4]

[2] Germany, Austria and France protested against the seizure of the British ship *Trent* by an American war vessel in 1862 although these states were not directly injured. (Bernard, *Neutrality of Great Britain during the American Civil War*, London, 1870, pp. 196ff.) The United States protested against deportation of civilians from Belgium by Germany in 1916. (Garner, *International Law and the World War*, Vol. 1, p. 177.) The United States protested against the indiscriminate bombardment of civilians in the Far Eastern and Spanish hostilities on Sept. 22 and 28, 1937, and on June 3, 1938. (See Q. Wright, "The Denunciation of Treaty Violators," *Am. Journal Int. Law*, July 1938, Vol. 32, p. 530.)

[3] *Proc. Am. Society of International Law*, 1915.

[4] "A treaty only creates law as between the states which are parties to it; in case of doubt no rights can be deduced from it in favor of third states." *German Interests in Upper Silesia*, Per. Ct. Int. Justice, Ser. A, No. 7, pp. 29ff. Hyde remarks that even a guarantor intervening to preserve a treaty can be justified "not by reason of the treaty, but on account of the illegal character of the conduct which it is sought to check." (*International Law*, Vol. 1, p. 120.) A treaty intended to establish a general rule or status may be so generally recognized as to "constitute an international settlement" which all states have a legal interest in main-

With respect to multipartite treaties, however, there is a different situation. The general rule that a treaty cannot burden or benefit third parties applies to multipartite as well as to bipartite treaties,[5] but the violation of a multipartite treaty usually injures all the parties legally, even though it does not injure all of them materially. Multipartite treaties are of two kinds, multipartite legislative treaties, sometimes referred to as multipartite and multilateral, in which all the parties agree to observe a common text in their relations to each other, and multipartite political treaties, sometimes called multipartite but bilateral, in which a group of states of the one part engages itself to a single state or a group of the other part.[6] The latter type has been common in the history of China, where frequently a group of Western powers has joined together to induce or compel China to assume certain obligations, frequently derogatory to her territorial sovereignty and in the interests of the group. The peace treaties ending the Great War were also of this type. The victorious allied and associated powers made treaties as a group with each of the defeated central powers.[7] While in such treaties most of the obligations usually fall upon a single state of the second part, they normally contain some clauses which impose reciprocal obligations on the group of the first part. They may also contain provisions which bind all the parties equally. The Nine Power Treaty of the Washington Conference, though drawn in the form of a legislative multipartite treaty, has clauses of all these types. Thus Articles III, V and VI bind China of the one part and the parties "other than China" of the other part; Article I binds the "contracting powers other than China" in their relations *inter se*; while Articles II, IV and VII bind all the parties equally.

In the legislative multipartite treaty every party is recognized to have a legal interest in the observance of the entire treaty by each of the other parties. Thus a violation of such a treaty is

taining. (See Q. Wright, "Conflicts between International Law and Treaties," *Am. Journ. Int. Law,* 1917, Vol. 11, p. 573.) On the subject generally, see Draft Convention on Treaties, Art. 18, and commentary, Research in International Law, *Am. Journ. Int. Law, Supp., 1935,* Vol. 29, pp. 918ff.

[5] Though there may be a stronger presumption that such a treaty has created "an international settlement" of interest to all states. (*Ibid.,* p. 923; A. D. McNair, "The Function and Differing Legal Character of Treaties," *Br. Year Book of Int. Law, 1930,* pp. 113, 114.)

[6] Hudson, *International Legislation,* Vol. I, Introduction, pp. xvi-xvii.

[7] *Ibid*

a legal injury to each party and entitles it to protest or to invoke any procedure which may be provided by the treaty or by other international instruments running between it and the violating state.[8] In the political multipartite treaty the same is usually true of certain articles, those which in terms bind all equally, and others which may be particularly specified as matters of superior interest.[9]

The general right of protest, in the event of violation of a multipartite treaty, does not imply a general obligation to protest or to take other sanctioning measures. No such obligation exists unless explicitly accepted in the treaty itself or in some other treaty, although even in the absence of such provision, ordinarily known as a guaranty, a multipartite treaty may envisage co-operation in its enforcement among all the parties. The spirit of a treaty as distinguished from its explicit obligations is, however, difficult to ascertain and lies in the realm of international policy rather than of international law. Such a spirit would clearly be different in a political multipartite treaty envisaging collective action by a group of states against a single state and in a legislative multipartite treaty envisaging collective action by all the parties to prevent or remedy a violation by any one of their number. The ambiguity of the Nine Power Treaty on this point may account in part for the failure of its spirit of co-operation to function in all cases where its violation was alleged.

Provisions of multipartite treaties, particularly those of political importance which have been specified as of general interest, among the European states have been referred to as constituting "the public law of Europe."[10] Such treaties among the American states have been referred to as constituting "American international law."[11] Similarly, the general treaties such as

[8] *Ibid.*, citing A. Rapisardi-Mirabelli, "Théorie générale de l'union internationale," Académie de droit internationale, *Recueil des cours*, 1915, Vol. 7, pp. 348ff.; and A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna, 1926, p. 48. See also Q. Wright, "The Meaning of the Pact of Paris," *Am. Journ. Int. Law*, Jan. 1933, Vol. 27, p. 40; Hunter Miller, *The Peace Pact of Paris*, N. Y., 1928, pp. 127-8.

[9] The General Act of the Congress of Vienna (Preamble) described certain provisions of the treaties concluded at the Congress and attached to it as annexes to be of "superior and permanent interest." See H. J. Tobin, *The Termination of Multipartite Treaties*, N. Y., 1933, p. 11. The treaty of Paris of 1856 (Art. VII) admitted Turkey to "the public law and concert of Europe." *Ibid.*, p. 219.

[10] Tobin, *op. cit.*, pp. 137-44; A. D. McNair, *op. cit.*, p. 113.

[11] Alvarez, *Le Droit International Américain*, Paris, 1910; Oppenheim, *International Law*, 5th ed., pp. 47ff.

those of the Washington Conference dealing with Far Eastern interests might be referred to as constituting the public law of the Far East, and certain treaties which have been ratified by states in all sections of the world, dealing with matters of general interest, might be considered to constitute the public law of the world. Of these the Pact of Paris, the League of Nations Covenant, the Statute of the Permanent Court of International Justice, the Constitution of the International Labor Organization and the First Hague Convention are the most important, though there are many others dealing with problems of communication and transport, legal, scientific and commercial standards, health, and social reform.[12]

In the address already referred to Elihu Root pointed out that:[13]

> International laws violated with impunity must soon cease to exist, and every state has a direct interest in preventing those violations which, if permitted to continue, would destroy the law. Wherever in the world the laws which should protect the independence of nations, the inviolability of their territory, the lives and property of their citizens, are violated, all other nations have a right to protest against the breakdown of the law. Such a protest would not be an interference with the quarrels of others. It would be an assertion of the protesting nation's own right against the injury done to it by the destruction of the law, upon which it relies for its peace and security.

The acceptance of this doctrine, which Root thought would be a change in theory in 1915, has now been in some measure effected through the incorporation of principles of the type to which he referred in multipartite treaties, in the observance of which all states are recognized as having a legal interest.

These multipartite treaties, including both general treaties ratified by states all over the world and regional treaties confined to states with Far Eastern interests, have a peculiar importance in defining the legal situation in the Far East. Their consideration will be supplemented by reference to general rules of international law and to bilateral treaties binding states of the Far East.

General rules of international law—though not ordinarily sanctioned by a duty or even by a right of states, not directly affected by a particular violation, to assume responsibility for

[12] McNair, *op. cit.*, p. 112. A *résumé* of the general and regional treaties of importance in the Far East is given by the author in *Diplomatic Machinery in the Pacific Area*, Inst. Pac. Rel. 1936, pp. 14-25.

[13] *Proc. Am. Soc. Int. Law*, 1915.

their enforcement—must be resorted to for determining the validity, meaning and application of treaties both general and particular. Only by reference to a system of concepts established by general practice and consent can the existence and the scope of any legal claim, whether based upon written instruments or custom, be demonstrated. General international law is such a system of concepts, defining the legal nature of the Family of Nations, of its members and of their relations. Resort to it is indispensable for the interpretation and application of formal international instruments.[14]

General international law, therefore, performs the function in the Family of Nations that the common law performs in the United States. Pursuing the analogy, general international conventions resemble the constitution and statutes of the United States, and regional international conventions resemble the constitutions and statutes of the states, with the difference that, because of the international law principle that no state is bound to a treaty without its consent and the fact that few of these conventions have been ratified by all states to which they are open, few are in fact uniformly applicable throughout the area for which they are designed.

Similarly, bilateral treaties resemble contracts, deeds, covenants and other instruments of agreement and title by which individuals acquire rights and duties. While a state subject to international law and an individual subject to the municipal law of the United States are different entities with different interests and capacities, they are alike in being members of a larger community and in being subjects of law expressed, in both cases, by a universal body of accepted concepts, by general and regional written instruments indicative of the will of the community or its local sub-divisions, and by instruments accepted by two or a few parties regulating their particular interests, establishing or transferring their rights.[15]

2. *Principles of general international law.* Under general international law it is assumed that sovereign states are the normal members of the Family of Nations and the normal subjects of

[14] Q. Wright, *Mandates*, p. 313. An examination of the draft convention on the law of treaties (*Am. Journ. Int. Law, Supp., 1935*, Vol. 29, pp. 657ff.) discloses the importance of general principles of international law in dealing with every aspect of treaty validity, interpretation, application and termination.

[15] On the numerous distinct functions performed by treaties see McNair, *op. cit.*, pp. 100ff.

international law, that the major interest of a state is the security of its status, its domain, its nationals and its jurisdiction, and that each state will respect these interests of others on the assumption of reciprocity.

Status consists in the body of legal powers entitling a state to enter into international relations, to make treaties and to resort to accepted international procedures for defending its rights on the basis of equality with other states. It is not to be assumed that a state will willingly reduce its status; consequently treaties should be construed if possible to avoid such a result.[16] But, on the other hand, it is assumed that states, having committed themselves by exercise of their sovereignty in making treaties or submitting disputes to adjudication, will observe in good faith the terms of the treaty or the award. *Pacta sunt servanda*.[17] The principle that treaties cease to be valid when essential conditions which moved the parties to enter into them have changed (*rebus sic stantibus*) will be considered later.

Domain or territory consists in the space occupied by land, water and air which a state has acquired by means recognized by international law, within which it is presumed to have exclusive jurisdiction and which it is presumed competent to dispose of at will. While states may grant to others jurisdiction within their territory for general or particular purposes, there is a presumption against such a grant, and such treaty provisions should be narrowly construed.[18] The high seas beyond the three-mile limit are not normally susceptible of becoming the domain of any state. Consequently there is a presumption against the validity of claims to domain in such seas, in the land under them or in the air above them.[19]

Nationals, in the sense of international law, consist of the persons over whom a state has acquired allegiance in accord with provisions of its municipal law consistent with international law, for whom it is entitled to legislate and whom it is entitled to protect even when they are residing abroad. While

[16] Wimbledon Case, Per. Ct. Int. Justice, Ser. A., No. 1, p. 24. This and other statements of international tribunals supporting this rule are quoted in "Draft Convention on Treaties," *op. cit.*, pp. 941-2. See also Willoughby, *Foreign Rights and Interests in China*, Vol. 1, pp. 33-4.

[17] *Ibid.*, Art. 20 and Commentary, pp. 977ff.

[18] See award, North Atlantic Fisheries Arbitration, Scott, Hague Court Reports, p. 160; Q. Wright, *Mandates*, p. 489.

[19] "Draft Convention on Territorial Waters," especially Arts. 4, 12, 20, *Am. Journ. Int. Law, Spec. Supp., 1929*, pp. 243ff.

international law formerly presumed the permanence of an individual's allegiance or nationality, this is no longer true. International law now presumes that an individual can change his allegiance by voluntary naturalization in the state where he resides.[20]

Jurisdiction consists in the capacity of a state to constitute a government and to make, apply and enforce municipal law. A state is presumed to enjoy this right within its domain and with respect to its nationals insofar as this can be done by acts not within the domain of another state. Even within the domain of other states, however, jurisdiction exists over diplomatic officials and public forces legally entitled to be there, and it also exists over ships flying the national flag on the high seas.[21]

Freedom in the exercise of jurisdiction within its territory and over its nationals is often spoken of as a state's independence, to be distinguished from its sovereignty which refers to its capacity to enter into relations with other states on an equal basis, and its domain or "territory" which refers to its legal title to an area irrespective of the qualifications of its jurisdiction within that area.

While general international law does not oblige states to submit their disputes to any form of international adjudication, it recognizes that disputes arising from divergent interpretations of international law or treaty are "international disputes," to be distinguished from domestic disputes, the solution of which international law leaves to a particular state's jurisdiction.[22] International disputes, differing from domestic disputes, are always appropriate subjects for formal, diplomatic action and, according to international law, such procedure must always be attempted before resort to reprisals or to the *ultima ratio* of war.[23] While in the absence of a treaty the latter is permitted and, when instituted, permits the use of regulated force in compelling the submission of the enemy, the conduct of hostilities by a belligerent in relations both with its enemy and with neutrals is regulated by international law.[24] The *de facto* results of violence do not in themselves change rights or law, though

[20] "Draft Convention on Nationality," especially Art. 13, *ibid.*, pp. 13ff.

[21] Oppenheim, *International Law*, 5th ed., Vol. 1, pp. 265ff.

[22] Q. Wright, *The Control of American Foreign Relations*, pp. 209-15.

[23] Oppenheim, *op. cit.*, Vol. 2, pp. 6, 122; Naulilao Case, *Annual Digest, 1927-28*, Case No. 360.

[24] Oppenheim, *op. cit.*, Vol. 2, pp. 171ff.

apart from the obligations of anti-war treaties, treaties compelled by war, or general recognition of a *de facto* situation, may do so.[25]

Force short of war may be used for defense in the presence of an instant and overwhelming necessity to prevent an impending irreparable injury, or for self-help if peaceful remedies for injuries resulting from illegal behavior have been first attempted and if the measures of reprisal undertaken are not in excess of the injury received.[26] These principles of general international law in regard to resort to violence have been very greatly modified by the wide acceptance of general treaties since the World War.[27]

International law specifies the procedures by which states may acquire and lose rights. In general it accepts agreement, prescription and general recognition as processes by which rights may be transferred, and supports the general principle of law that an illegal act cannot be a source of right.[28] The wide acceptance of obligations not to resort to hostilities has given a broader application to this principle. Insofar as a change in the *de facto* situation is brought about by illegal violence, no legal change can flow from the situation except insofar as recognized or acquiesced in for a long time by all the states whose rights have been violated.

[25] Q. Wright, "The Stimson Note of January 7, 1932," *Am. Journ. Int. Law*, April 1932, Vol. 26, pp. 346ff.

[26] Q. Wright, "The Outlawry of War," *Am. Journal Int. Law*, Jan. 1925, Vol. 19, pp. 89ff.

[27] Q. Wright, "The Meaning of the Pact of Paris," *Am. Journ. Int. Law*, Jan. 1933, Vol. 27, pp. 39ff. See also discussion of legal consequences of military occupation, war and aggression, Chap. V, section 4.

[28] In the writer's opinion the maxim *"Ex injuria jus non oritur"* is generally qualified by the proposition that the exercise of clear legal powers may establish rights, even though those powers are exercised in breach of a legal duty. (See J. W. Salmond, *Jurisprudence*, London, 1902, p. 234; and Q. Wright, "The Stimson Note," *Am. Journ. Int. Law*, April 1932, Vol. 26, p. 345.) This exception, however, is not applicable with respect to acts of international violence because such acts do not constitute legal powers, the exercise of which might transfer rights under international law. Thus Charles Cheney Hyde has indicated that military occupation alone cannot give the occupant title to territory: "It is not believed that conquest indicates a mode by which a right of sovereignty comes into being, or by virtue of which an existing one is transferred. Although the victor may be able to bring about a transfer of rights of sovereignty by some appropriate action, the bare possession of such power does not suffice to effect a change. . . . The common method of so doing is by compelling a transfer embodied in an appropriate treaty." (*International Law*, Boston, 1922, Vol. 1, pp. 175-6. See also George Grafton Wilson, *International Law*, 2nd ed., St. Paul, 1927, p. 240.)

War was formerly regarded as a legitimate procedure for changing rights; while this view receded during the nineteenth century, war continued to be regarded as an abnormal condition during which both belligerents and neutrals had exceptional rights and duties.[29] With this elaboration of the legal consequences of war, international law developed the distinction between war in the legal sense and hostilities short of war or war in the material sense.[30] During the twentieth century most states accepted legal obligations not to resort to war, or, in some cases, not to use armed force for the solution of international controversies.[31] As a consequence, states, while continuing to resort to the use of armed force, have been reluctant to acknowledge that they are resorting to war.[32] Definition of the circumstances in which the rules of war and neutrality are applicable, and determination of the rules applicable to hostilities which are not war in the legal sense, have therefore acquired increased importance.[33]

[29] Q. Wright, "Changes in the Conception of War," *Am. Journ. Int. Law*, Oct. 1924, Vol. 18, pp. 755-63.

[30] The Price Cases, Nelson, J., dissenting, 2 Black, 635; The Three Friends, 166 U. S. 1, 1897; Q. Wright, *op. cit.*, p. 761.

[31] Q. Wright, "The Outlawry of War," *Am. Journ. Int. Law*, Jan. 1925, Vol. 19, pp. 83-9; "The Meaning of the Pact of Paris," *ibid.*, Jan. 1933, Vol. 27, pp. 50-6; Harvard Research in International Law, "Draft Convention on Rights and Duties of States in Case of Aggression." *Supp. Am. Journ. Int. Law*, Oct. 1939. This publication, pp. 27ff., quotes such obligations in 13 multipartite and about 150 bipartite treaties, of which only 25, all bipartite treaties between Latin-American states, were prior to the 20th Century.

[32] There appear to have been no formal declarations of war or ultimatums, except that of Paraguay against Bolivia on May 10, 1933, from the close of the World War to the Declarations by Great Britain and France against Germany on September 3, 1939, though large-scale hostilities had occurred in Manchuria, 1931; Ethiopia, 1935; Spain, 1936; and China, 1937, as well as in the Chaco, and there had been numerous lesser hostilities.

[33] See Q. Wright, "Changes in the Conception of War," *Am. Journ. Int. Law*, 1924, Vol. 18, pp. 758-60; "Neutral Rights following the Pact of Paris," *Proc. Am. Soc. Int. Law*, 1930, pp. 79ff.; "When does War Exist?" *Am. Journ. Int. Law*, April 1932, Vol. 26, pp. 362ff.; "The Meaning of the Pact of Paris," *ibid.*, Jan. 1933, Vol. 27, pp. 57ff.; "Comments," *Proc. Am. Soc. Int. Law*, 1938, pp. 122, 146, 150, 191; A. D. McNair, "The Legal Meaning of War," *Transactions of the Grotius Society*, London, 1925; Clyde Eagleton, "The Attempt to Define Aggression," *International Conciliation*, Nov. 1930, No. 264; "The Attempt to Define War," *ibid.*, June 1933, No. 291; "Responsibility for Damages to Persons and Property of Aliens in Undeclared War," *Proc. Am. Soc. Int. Law*, 1938, pp. 127ff.; J. L. Brierly, "International Law and Resort to Armed Force," *Cambridge Law Journal*, 1932, Vol. 4, pp. 308ff.; Philip Jessup, "The Birth, Death and Reincarnation of Neutrality," *Am. Journ. Int. Law*, 1932, Vol. 26, pp. 789ff.; E. M. Borchard, "War" and "Peace," *ibid.*, Jan. 1933, Vol. 27, pp. 114ff.; Sir John Fischer Williams, "The Covenant and War," *Cambridge Law Journal*, 1933, Vol. 5, pp. 1ff., reprinted in *Some Aspects of the Covenant of the League of Nations*, Oxford, 1934,

Whether the use of armed force by a state constitutes war in the legal sense depends, not upon the magnitude of hostilities, nor even upon the manifestation of an intention to make war by declaration, ultimatum or other overt act by one or more of the participants,[34] but upon the general recognition of the situation as war by third states. Prior to the general acceptance of obligations not to resort to hostilities, every state had the power to create a state of war by publicly manifesting its intention to do so. This is still true if no such obligation is applicable, but in view of the almost universal ratification of the Pact of Paris, such circumstances are rare.

War is the legal condition which *equally* permits two or more hostile groups to contend by regulated violence.[35] If hostilities are resorted to contrary to obligations owed to other states, such other states are free to discriminate against the state, technically known as the aggressor, found to be responsible for the hostilities.[36] If they do so discriminate, the situation is not war in the legal sense because legal equality of the participants is the essence of war. Consequently, only if, by proclaiming impartial neutrality, they recognize the situation as war does it have that status.[37]

pp. 292ff.; J. Shinobu, *International Law in the Shanghai Conflict*, Tokyo, 1933, Chap. 2; H. Lauterpacht, "Resort to War," *Am. Journ. Int. Law*, 1934, Vol. 28, pp. 43ff.; H. Briggs, *The Law of Nations, Cases, Documents and Notes*, N. Y., 1938, pp. 718-25; G. G. Wilson, "War Declared and the Use of Force," *Proc. Am. Soc. Int. Law*, 1938, pp. 106ff.; A. E. Hindmarsh, F. E. Dunn, J. Kunz, Lester Woolsey et al., "Comments," *ibid.*, pp. 119ff., 140ff.; W. W. Willoughby, *The Sino-Japanese Controversy and the League of Nations*, Baltimore, 1935, pp. 541ff.

[34] By the Third Hague Convention of 1907 "the contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war." This was generally observed during the World War; see Naval War College, *International Law Documents*, 1917, and G. G. Wilson, *op. cit.*

[35] For various definitions of war see Q. Wright, "Changes in the Conception of War," p. 762. The legal conception of war resembles that of the duel, rather than of police action, crime or mass violence.

[36] See "Budapest Articles of Interpretation," International Law Association, *Report of 38th Conference*, Sept. 1934, p. 66ff.; Harvard Research, "Draft Convention on Rights and Duties of States in Case of Aggression;" Sir John Fischer Williams, "Recent Interpretations of the Briand-Kellogg Pact," *International Affairs*, May-June 1935, Vol. 14, pp. 346ff; Q. Wright, "The Meaning of the Pact of Paris," *cit.*; "Present Status of Neutrality," *Am. Journ. Int. Law*, July, 1940, Vol. 34, p. 407; "The Lend-Lease Act and International Law," *ibid.*, April, 1941.

[37] Members of the League of Nations are of course legally obliged by Article 16 not to be impartial if war has been resorted to in breach of Articles 12, 13 or 15 of the Covenant, though many members of the League have interpreted this

While the rules applicable to situations of aggression, insurrection, reprisal, pacification, intervention and other uses of armed force not recognized as war are not clearly defined, it appears that in all such situations humanitarian rules of war designed to prevent unnecessary suffering of combatants, and to protect prisoners of war, the sick and wounded, non-combatants and nationals of third states are applicable.[38]

With respect to confiscations of property, abrogation or suspension of treaties, occupation of territory, destruction of life and property, and other acts affecting pre-existing rights, the tendency has been to recognize the applicability of the maxim already referred to, that an illegal act cannot be a source of right. If the initiation of hostilities is itself illegal, no act contrary to normal international law can be legitimatized thereby. Thus the state which illegally precipitates hostilities, whether by negligence or wrongful act, is responsible and bound to compensate for all losses resulting therefrom.[39]

If hostilities have not been generally recognized as either war or aggression, the state within whose territorial jurisdiction losses occur has been held responsible according to the standard of due diligence or negligence. Thus it has been held that a state is liable for injuries to nationals of third states occurring within its territory and resulting from insurrection or its suppression, provided it could have prevented the injury by the use of due diligence.[40] If the injury resulted from acts of intervention or reprisal by another state, the state with territorial juris-

obligation as permitting neutrality. See DeVisscher, *The Stabilization of Europe*, Chicago, 1924, p. 111; Wright, "Meaning of the Pact of Paris," *cit.*; "Communications from Governments in regard to Principles of the Covenant," 1936 (League of Nations, *Off. Journal*, Spec. Supp., No. 154); *Report of Special Committee set up to Study Application of the Principles of the Covenant* (Political, 1938, VII. 1).

[38] Budapest Articles, No. 7; Harvard Research, "Draft Convention on Aggression," Art. 14; *supra*, note 36. Clyde Eagleton ("Responsibility for Damages to Persons and Property of Aliens in Undeclared War," *Proc. Am. Soc. Int. Law*, 1938, pp. 127ff.) finds that the tendency of international law (if not of international practice), "to relieve individuals and their property from the losses incident to war, and to cast the burden upon the State," applies to all types of hostilities "whether formal war, civil war or insurgency, or just plain hostilities or fighting."

[39] See *supra*, note 28.

[40] *Spanish Treaty Claims Commission, Fuller's Report*, 1907, p. 25; 1910, p. 6; Harvard Research, "Draft Convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners," Art. 12, *Am. Journ. Int. Law Special supp., 1929*, pp. 193-4.

diction is responsible, if a due observance of its obligations would have avoided such reprisals.[41]

If hostilities have been recognized as aggression, the aggressor does not acquire rights or relieve itself of duties, while the defending state acquires the rights which, if it were a belligerent, it would have against an opposing belligerent. Thus the aggressor is responsible for all the losses and damages sustained by the defender or by third states resulting from the acts of its armed forces, from confiscations under alleged war powers, or from acts of legitimate defense by the defender. The defender, on the other hand, is responsible only for losses resulting from the acts of its armed forces or other authorities contrary to the law of war.[42]

These general principles and presumptions of international law are pertinent to the present inquiry because in the relations of Western and Eastern states they have frequently failed of application in practice, although, since general recognition of the status of Eastern countries as members of the Family of Nations, their application in theory has been recognized. The principle last stated, in providing the legal basis for the Stimson doctrine and the League's resolutions of March 11, 1932, and February 24, 1933, has been considered applicable to recent Far Eastern hostilities. From this principle it follows that illegal acts of violence in China cannot in themselves bring about a legal change in the domain of China,[43] nor can they deprive the nationals of China or of other states of the right to compensation for losses of life and property resulting from such acts.[44]

An examination of the treaties applicable in the Far East suggests that by subject matter they can be roughly divided into four classes: political treaties, pacific settlement treaties, commercial treaties and administrative treaties.[45] According to the

[41] Greytown Case, *Moore's Digest of International War,* Vol. 6, pp. 926-49. Eagleton, *Proc. Am. Soc. Int. Law,* 1938, p. 136; Harvard Research, "Draft Convention on Responsibility of States," Art. 14, *loc. cit.*

[42] Harvard Research, "Draft Convention on Aggression," Arts. 2-8, *loc. cit.;* Q. Wright, "Responsibility for Losses in Shanghai," *Am. Journ. Int. Law,* July 1932, Vol. 26, pp. 586ff.; Eagleton, *op. cit.; Proc. Am. Soc. Int. Law,* 1938, p. 139.

[43] See Introduction, *supra;* Q. Wright, "The Legal Foundations of the Stimson Doctrine," *Pacific Affairs,* Dec. 1935, Vol. 8, p. 439ff.

[44] *Supra,* note 42, and Chap. 5, sec. 4, *supra.*

[45] M. T. Z. Tyau (*The Legal Obligations Arising out of Treaty Relations between China and other States,* Shanghai, 1917) classifies China's treaty obligations as Political (p. 22), Economic or Commercial (p. 95) and General (p. 168).

number of participants, as already indicated, they can be classified as bipartite, regional and general.

3. *Political treaties.* Political treaties deal with the termination of war and hostilities, the status of territories and governments, alliances, guaranties and sanctions, armaments and arms trade. The territorial situation as established by such treaties in the Far East has already been considered. It is to be noted that while some of the existing territorial situations originated in bipartite treaties of peace such as the Treaties of Nanking (1842), Shimonoseki (1895) and Portsmouth (1905), other powers usually expressed an interest and often insisted on changes before recognizing the situation which the treaty sought to establish. Thus Russia, France and Germany intervened to prevent China's cession of the Liaotung peninsula to Japan in 1895; the powers hesitated to recognize the spheres of interest in China claimed on the bases of particular treaties, and this problem as well as the special provisions of the Versailles Treaty dealing with Shantung were reconsidered at the Washington Conference of 1922. Certain treaties establishing status in the Far East, such as the Boxer Protocol of 1901 and the Treaties of Versailles and Saint-Germain, were multipartite, although not in all cases ratified by all of the powers interested in the Far East.[46]

Practice in the Far East supports the general principle of international law that a treaty affecting territory or status, and therefore normally of interest to a large number of states, cannot be regarded as valid unless ratified or recognized by all of the states whose legal interests are affected by it. It is this principle which gives significance to the statement by the United States in 1932, based on its statement in 1915[47] and endorsed by the

[46] The Soviet Government was not invited to sign the Versailles Treaty, China declined to sign and the United States declined to ratify it. For parties to Boxer Protocol of 1901 and "Treaty Powers," entitled to extraterritoriality in China, see *infra*, note 90.

[47] On May 13, 1915, during the Sino-Japanese negotiations on the 21 Demands, the United States notified China and Japan "that it cannot recognize any agreement or undertaking which has been entered into or which may be entered into between the Governments of China and Japan impairing the Treaty rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China, or the international policy relative to China commonly known as the Open Door Policy." This was read by Secretary Hughes during discussion of the 21 Demands treaty at the Washington Conference. Willoughby, *Foreign Rights and Interests*, Vol. 1, p. 237. A precedent for the territorial aspect of the Stimson doctrine may be found in the American note to Japan on May 31,

members of the League of Nations in 1933,[48] that it did not propose to recognize any treaty or agreement made by others "which may impair the treaty rights of the United States or its citizens in China" or "which may be brought about by means contrary to the Covenant and obligations of the Pact of Paris." In the absence of general recognition such a treaty would lack one of the requirements of validity.

Treaties of alliance are of significance from the political rather than from the legal point of view. The Japanese-Manchukuo alliance of September 15, 1932,[49] the Soviet-Mongol mutual assistance pact of March 12, 1936,[50] the Soviet-Chinese non-aggression pact of August 21, 1937,[51] and the anti-Communist pact of November 6, 1937, between Germany, Italy and Japan,[52] doubtless have political importance, although their legal significance may be subject to question. The Soviet-Chinese treaty is based upon the Pact of Paris and resembles other non-aggression treaties made by the Soviet Union with its neighbors. Japan protested Germany's conclusion of a far-reaching non-aggression pact with the U.S.S.R. on August 23, 1939, as inconsistent with the anti-Communist pact, denounced the latter, and announced a policy of "splendid isolation."[53]

The Washington Conference treaties, the League of Nations

1921, concerning the latter's troops in Siberia, stating that "the Government of the United States can neither now nor hereafter recognize as valid any claims or titles arising out of the present occupation and control, and that it cannot acquiesce in any action taken by the Government of Japan which might impair existing treaty rights or the political or territorial integrity of Russia." This statement was also read during the Washington Conference. "Conference on Limitation of Armament," 67th Congress, 2nd Session, *Sen. Doc. 126*, p. 860.

[48] See Introduction, *supra*.

[49] Akagi, *Japan's Foreign Relations*, p. 496; *The Manchoukuo Year Book, 1934*, p. 152.

[50] *China Year Book, 1938*, p. 30, where China's protest and the Soviet reply are also printed.

[51] *Ibid.*, p. 373.

[52] *Ibid.*, p. 380. This merely registered Italian accession to the German-Japanese agreement of Berlin, November 25, 1936, and led at once to Italian recognition of "Manchukuo," Nov. 29, 1937.

[53] The German-Soviet pact was concluded for ten years and extended the policy of the Rapallo treaty of April 16, 1922, which had been continued and strengthened by the neutrality treaty of April 24, 1926. The latter was originally to last five years but was continued indefinitely by the protocol of June 24, 1931, ratified on June 30, 1933, after Hitler had come into power. The Pact of 1939, however, appeared to be applicable whether or not the other party engaged in aggression against a third power. See Royal Institute of International Affairs, *Bulletin of International News*, August 26, 1939, Vol. 16, pp. 843ff.

Covenant and the Pact of Paris contain political provisions of importance in the Far East, though their major significance is in the procedures they envisage looking toward the elimination of violence and the substitution therefor of pacific means of settlement. Article I of the Nine Power Treaty of Washington and Article X of the League of Nations Covenant, by obliging the parties to respect the territorial integrity and political independence of China, undoubtedly give the parties to these treaties a legal interest in any modification of the territory or independence of China, and consequently the right to insist that no such modification shall acquire validity without their recognition. The Nine Power Treaty, in addition, obliges the parties to engage in "full and frank communication" if any one of them considers that a situation involving application of these stipulations arises, and this provision was invoked by Belgium in calling the Brussels Conference in November 1937.[54] It also seems to imply that none of the parties should assist or permit assistance from their territories to acts of a party in violation of its obligations under the treaty.[55] The League of Nations Covenant goes even further in obliging the members of the League to "preserve as against external aggression the territorial integrity and existing political independence" of China, subject to the duty of the Council to "advise upon the means by which this obligation shall be fulfilled." These three treaties are today binding upon the states which have ratified them.

The Pact of Paris was ratified without important reservations[56] by all states with Far Eastern interests and it has not been contended that it has ceased to be binding. Issues have been raised with regard to the meaning and significance of the notes

[54] E. S. Rubinow, *Sino-Japanese Warfare and the League of Nations,* Geneva, Research Center, 1938, Vol. 9, No. 3, pp. 56ff.

[55] See remarks of Lewis B. Schwellenbach, U. S. Senator from Washington, *Congressional Record,* August 2, 1939.

[56] The only reservation among the original signatories was that by Japan which declared "that the phraseology 'in the names of their respective peoples,' appearing in Article I of the Treaty . . . viewed in the light of the provisions of the Imperial Constitution, is understood to be inapplicable in so far as Japan is concerned." ("Treaty for the Renunciation of War," U. S. Dept. of State, Pub. No. 468, p. 101.) Secretary Kellogg stated that "Interpretations to the multilateral treaty to renounce war are in no way a part of the pact and cannot be considered as reservations. The interpretations will not be deposited with the text of the treaty." (David Hunter Miller, *The Peace Pact of Paris,* N. Y., 1928, p. 118; Q. Wright, "The Meaning of the Pact of Paris," *A.J.I.L.,* Jan. 1933, Vol. 27, p. 43; "The Interpretation of Multilateral Treaties," *ibid.,* Jan. 1929, Vol. 23, p. 94.)

exchanged among certain of the original parties during its negotiation. From a legal point of view it seems clear that the meaning of the Pact is to be determined by the text, which alone was ratified by all the parties,[57] and that the preliminary correspondence has merely an interpretative .value indicating that the right of self-defense in the presence of an immediate threat to vital interests is not forbidden by the treaty, but that it belongs, not to the state exercising this right, but to international procedures to determine whether a particular act alleged to be in self-defense is in fact to be so regarded.[58] The United States and the members of the League of Nations have held that the Japanese invasions of China in 1931 and 1937 were not permissible acts of self-defense.[59] The Pact of Paris does not impose

[57] Egypt, Persia and the U.S.S.R. expressly accepted the text, but not the "reservations" made by certain powers. ("Treaty for the Renunciation of War," *cit.*, pp. 169, 239, 270.) Turkey "considered herself reciprocally bound by the text of the proposed act, outside of all documents which have not been submitted as an integral part of the pact to the collective signature of the participating states." (*Ibid.*, p. 297.)

[58] Q. Wright, "The Meaning of the Pact of Paris," *cit.*, pp. 42ff.

[59] "Resolution of League of Nations Assembly," Feb. 24, 1933: "It is, however, indisputable that, without any declaration of war, a large part of Chinese territory has been forcibly seized and occupied by Japanese troops and that, in consequence of this operation, it has been separated from and declared independent of the rest of China." After noting obligations under Articles 10 and 12 of the Covenant: "While at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to lie on one side and the other, no question of Chinese responsibility can arise for the development of events since September 18, 1931." See also quotations in introduction, *supra*, and note of United States, February 25, 1933, that "the findings of fact arrived at by the League and the understanding of the facts derived by the American Government from reports made to it by its own representatives are in substantial accord. In the light of its findings of fact, the Assembly of the League has formulated a measured statement of conclusions. With those conclusions the American Government is in general accord." (See Manley O. Hudson, *The Verdict of the League*, World Peace Foundation, Boston, 1933, pp. 72, 87.) A resolution of the Assembly on October 6, 1937, asserted that "the military operations carried on by Japan against China by land, sea and air are out of all proportion to the incident that occasioned the conflict; that such action cannot possibly facilitate or promote the friendly cooperation between the two nations that Japanese statesmen have affirmed to be the aim of their policy; that it can be justified neither on the basis of existing legal instruments nor on that of the right of self defense, and that it is in contravention of Japan's obligations under the Nine-Power Treaty of February 6th, 1922, and under the Pact of Paris of August 27th, 1928." On the same day the United States declared: "In the light of the unfolding developments in the Far East the Government of the United States has been forced to the conclusion that the action of Japan in China is inconsistent with the principles which should govern the relationships between nations and is contrary to the provisions of the Nine-Power Treaty of February 6th, 1922, regarding principles and policies to be followed in matters concerning China and to those of the

any specific obligations upon its parties to undertake either independent or collective sanctioning action in the event of its violation, although it has been asserted that its spirit requires consultation in such a crisis and the prevention of assistance to the violator. The United States, in fact, initiated a discussion of its application among the powers on the occasion of Soviet military action in Manchuria in 1929 and Japanese military action there in 1931. Secretary Hull repeatedly referred to its provisions in official communications in the new crisis in the Far East in 1937.

The League of Nations Covenant is not now binding on several of the great Powers with Far Eastern interests, the United States, Japan, Italy and Germany, although the last three were at one time members of the League. It was not binding upon Soviet Russia until that country entered the League in 1934. Japan then withdrew from the League by notice given in 1933 and considered to have come into effect two years later on March 27, 1935, although China questioned this on the ground that Japan had not fulfilled all its obligations under the Covenant (alluding to the non-fulfillment of Articles 12 and 15 as applied in the Assembly recommendation of 1933 in regard to Manchuria) as required by Article I, paragraph 3, of the Covenant, prior to withdrawal.[60] The Covenant not only confers a right upon all members to protest diplomatically and to invoke legal procedures in the event of its violation, but it imposes specific obligations on the powers to contribute to its enforcement. Whether these obligations of Articles X and XVI are individual and several, and exist for each member irrespective of the behavior of others, or are joint and collective and come into operation only after consultation has matured a common policy, is controversial.[61] A resolution of the Assembly in September 1938 recognized that their application was to some extent optional. In any case the members of the League are obliged to consult and the League as a whole is obliged under Article XI

Kellogg-Briand Pact of August 27, 1928. Thus the conclusions of this government with respect to the foregoing are in general accord with those of the Assembly of the League of Nations." (*Japanese Aggression and the League of Nations*, 1937, Press Bureau of the Chinese Delegation, Geneva, pp. 53, 62; Dept. of State, *Press Releases*, Oct. 9, 1937, p. 285; E. S. Rubinow, *Sino-Japanese Warfare and the League of Nations*, Geneva Studies, May 1938, Vol. 9, No. 3, pp. 48ff.; *China Year Book, 1938*, p. 374; See also *supra*, Chap. 5, note 52.

[60] Willoughby, *Sino-Japanese Controversy*, pp. 598-603.

[61] See J. F. Williams, "Great Britain and the League," *International Affairs*, March 1938, Vol. 17, pp. 198ff.

to "take any action which may be deemed wise and effectual to safeguard the peace of nations." Elaborate consultation under the League was undertaken on the occasion of Japanese invasions of China in 1931 and 1937. Certain common policies were accepted but they have not been effectively applied, although by a resolution of September 1938 the Assembly recommended that certain sanctions be applied by the members acting individually.

The Nine Power Treaty has been ratified by all the important powers with Far Eastern interests except the Soviet Union and Germany.[62] Its continued effectiveness among the powers party to it has never been denied by any government,[63] but the question has been raised whether changed conditions, especially the disorderly condition of China, the increasing influence of Soviet Russia in the Far East, the termination or non-fulfillment of other of the Washington Conference treaties or resolutions, the non-co-operative spirit of the parties in economic, cultural and political matters, have not impaired essential conditions of its validity.[64]

[62] The original parties were Great Britain with four dominions, Canada, Australia, New Zealand and India, France, Italy, Japan, the United States, China, Netherlands, Portugal and Belgium. Norway, Sweden, Denmark, Mexico and Bolivia subsequently acceded.

[63] On November 12, 1937, in reply to a note of the Brussels Conference on November 6, Japan wrote: "The participating Powers state they would be prepared to designate representatives of a small number of powers for an exchange of views with representatives of Japan within the scope of the Nine Power Treaty and in conformity with its provisions. However, the Imperial Government adhere firmly to the view that their present action, being one of self-defense forced upon Japan by China's challenge, lies outside the scope of the Treaty and that there is no room for discussion of the question of its application. It certainly is impossible for them to accept an invitation to a conference in accordance with stipulations of that treaty after Japan has been accused of violating its terms." (*Documents concerning the Sino-Japanese Conflict*, China Reference Series, New York, 1938, Vol. 2, p. 69; *China Year Book, 1938*, p. 379.) Japanese members at the Yosemite Conference of the Institute of Pacific Relations "maintained that Japan has not violated the Nine Power Treaty and does not regard it as obsolete; but inasmuch as it appears to have lost its significance to some extent, they felt it should be revised to meet existing conditions." (*Problems of the Pacific, 1936*, p. 187.) In a note to the United States on November 18, 1938, Japan expressed the "firm conviction" that "inapplicable ideas and principles of the past" would not contribute to solving problems of the Far East. (Department of State, *Press Releases*, November 19, 1938, p. 352.)

[64] In its note to the Washington Conference Powers on December 28, 1926, the British Government wrote: "The situation which exists in China today is thus entirely different from that which faced the Powers at the time they framed the Washington treaties. In the present state of confusion, though some progress has

The doctrine that changed conditions may affect the validity of treaties is familiar in international law, but the scope of this doctrine, usually referred to as *"rebus sic stantibus,"* is highly controversial. The Research in International Law, sponsored by

been made by means of local negotiation and agreements with regional Governments, it has not been possible for the Powers to proceed with the larger programme of treaty revision which was foreshadowed at Washington or to arrive at a settlement of any of the outstanding questions relating to the position of foreigners in China. The political disintegration in China has, however, been accompanied by the growth of a powerful Nationalist movement, which aimed at gaining for China an equal place among the nations, and any failure to meet this movement with sympathy and understanding would not respond to the real intentions of the Powers towards China." (*Treaties and Agreements With and Concerning China, 1919-1929*, Carnegie Endowment, Pamphlet No. 50, 1929, pp. 187-8.) The British Government, however, did not conclude from these changed conditions that the Nine Power Treaty had become invalid, but that the program of emancipation of China from unequal restrictions should proceed more rapidly. At the Yosemite Conference Japanese members pointed out "that the treaty should be regarded in relation to the resolutions which accompanied it, most of which have not been fulfilled," apparently referring to the resolutions regarding relinquishment of extraterritoriality (No. 4), the reduction of Chinese military forces (No. 9), and the withdrawing of foreign armed forces from China (No. 6). They also indicated that "the exclusion of the Soviet Union from the original list of signatories deprived the provisions of the treaty of reality," and "anti-Japanese activities in China constituted a definite violation of the treaty in that they were inimical to the security of Japan." (*Problems of the Pacific, 1936*, p. 187.) In his letter to Senator Borah on February 23, 1932, Secretary of State Stimson wrote: "It must be remembered also that this treaty was one of several treaties and agreements entered into at the Washington Conference by the various Powers concerned, all of which were interrelated and interdependent. No one of these treaties can be disregarded without disturbing the general understanding and equilibrium which were intended to be accomplished and effected by the group of agreements arrived at in their entirety. The Washington Conference was essentially a Disarmament Conference aimed to promote the possibility of peace in the world, not only through the cessation of competition in naval armament, but also by the solution of various other disturbing problems which threatened the peace of the world, particularly in the Far East. These problems were all interrelated. The willingness of the American Government to surrender its then commanding lead in battleship construction and to leave its positions at Guam and in the Philippines without further fortification, was predicated upon, among other things, the self-denying covenants contained in the Nine Power Treaty, which assured the nations of the world not only of equal opportunity for their Eastern trade but also against the military aggrandizement of any other power at the expense of China. One cannot discuss the possibility of modifying or abrogating those provisions of the Nine Power Treaty without considering at the same time the other promises upon which they were really dependent." (Willoughby, *The Sino-Japanese Controversy*, p. 252.) While Secretary Stimson here indicated a general interrelation of the Washington Conference Treaties, he implied that the validity of the disarmament treaty might be impaired by abrogation of the Nine Power Treaty rather than the reverse. Charles P. Howland (*Survey of American Foreign Relations, 1928*, pp. 529-31) suggests that the basic

a group of American jurists, has formulated the rule as follows:[65]

A treaty entered into with reference to the existence of a state of fact, the continued existence of which was envisaged by the parties as the determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when the state of fact has been essentially changed.

Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

Applying this definition, it appears that none of the grounds suggested would be sufficient to render the Nine Power Treaty invalid. The disorderly condition of China, far from being a condition which has changed since the treaty was made, was a

political bargain of the Conference was the American concession of Article XIX of the Five Power Treaty eliminating further naval base development in the Pacific wanted by Japan, in exchange for the Four Power Treaty eliminating the Anglo-Japanese alliance. A memorandum on an *American Foreign Policy toward International Stability*, prepared under the auspices of the Norman Wait Harris Memorial Foundation at the University of Chicago, stated: "It seems probable that the passage of the Exclusion Act in 1923, contrary to 'the gentlemen's agreement' of 1908, and the indifference of Congress to the representations of Japanese merchants while the Smoot-Hawley tariff was under consideration contributed to the weakening of the prestige of the Shidehara policy. This policy, grounded on the Washington treaties, was designed to solve Japan's population problem by further industrialization of that country and the increase of exports of manufactured articles to the United States and China." (Public Policy Pamphlets, U. of Chicago Press, No. 14, p. 60.) In an "American View of Far Eastern Problems" (*International Affairs*, London, Jan. 1935, Vol. 14, p. 74), the present writer elaborates this idea: "If the United States had paid more attention to what I call the moral and economic necessities of Japan, possibly Japanese loyalty to the Washington Treaties might have been maintained." This of course had reference to the moral foundations rather than to the legal validity of the treaty. The same comment applies to A. N. Holcombe's statement, "The Nine Power Treaty is already obsolete on account of the breakdown of the concert of the powers and the abandonment of the old policy of foreign tutelage" (*The Chinese Revolution*, 1930, p. 346); and to George H. Blakeslee's statement, "The evolving nature of relations with China has left far behind the Nine Power Treaty which laid down a hard and fast rule for cooperation." (*American Foreign Relations*, C. P. Howland, Ed., 1930, p. 142.)

[65] *Am. Journ. Int. Law, Supp., 1935*, Vol. 29, p. 1096.

condition which then existed and because of which the treaty was made.[66] The Lytton Commission in fact pointed out in 1932 that the authority of the central government of China over its territory had somewhat increased since 1922.[67]

The treaty is open to adhesion by the U.S.S.R. at the present time.[68] Its effectiveness, however, was contingent only upon ratification by the original signatories, and the failure of any other state to ratify cannot be considered a ground for its invalidity. The importance of Russian interests in the Far East was in fact recognized during the Washington Conference and in the League of Nations discussions of 1931-2, and measures were taken to insure respect for those interests.[69]

While in a political sense the Washington Conference treaties

[66] "At the time this treaty was signed, it was known that China was engaged in an attempt to develop the free institutions of a self-governing republic after her recent revolution from an autocratic form of government; that she would require many years of both economic and political effort to that end; and that her progress would necessarily be slow. The treaty was thus a covenant of self-denial among the signatory powers in deliberate renunciation of any policy of aggression which might tend to interfere with that development. It was believed—and the whole history of the development of the 'open door' reveals that faith—that only by such a process, under the protection of such an agreement, could the fullest interests not only of China but of all nations which have intercourse with her best be served." (Sec. Stimson, Letter to Sen. Borah, Feb. 24, 1932, Willoughby, *op. cit.*, p. 251.) "An argument which constantly reappears in the polemics of the present controversy is that China is 'not an organized State' or 'is in a condition of complete chaos and incredible anarchy,' and that her present-day conditions should disqualify her from membership of the League of Nations and deprive her of the protective clauses of the Covenant. In this connection, it may be useful to remember that an altogether different attitude was taken at the time of the Washington Conference by all the participating Powers." (Lytton Commission, *Report*, p. 17.)

[67] P. 17. The Commission laid down the principle, later adopted by the Assembly: "Any solution should conform to the provisions of the Covenant of the League of Nations, the Pact of Paris, and the Nine Power Treaty of Washington." *Ibid.*, p. 130; *Verdict of the League*, p. 77.

[68] See Article 8. Thirteen states were invited to adhere in 1925 when the treaty came into force among the nine signatories. The U.S.S.R. was not included in this invitation because it was not then recognized by all the signatories. (See Willoughby, *Foreign Rights and Interests*, Vol. 1, p. 24.)

[69] See discussion at Washington Conference on Chinese Eastern Ry. (Willoughby, *Foreign Rights and Interests*, Vol. 1, p. 420ff, and Resolutions Nos. 11, 12, p. 440) and on Japanese troops in Siberia (Conference on the Limitation of Armament, 1922, 67th Congress, 2nd session, *Sen. Doc. 126*, p. 853ff.) and principles laid down by Lytton Commission for settlement of Sino-Japanese dispute of 1931-2, adopted by the Assembly Feb. 24, 1933: "2. Consideration for the interests of the Union of Soviet Socialist Republics. To make peace between two of the neighboring countries without regard for the interests of the third would be neither just nor wise, nor in the interests of peace." (*Report*, p. 130; *Verdict of the League*, p. 76.)

and resolutions had a relation to each other, and it was urged in the United States Senate that ratification by the United States of the Four Power Treaty was a prerequisite to ratification of certain of the other treaties by other states, this relationship was political, not legal.[70] One of the Washington treaties, that dealing with submarine warfare and poison gases, never went into effect at all,[71] and the Five Power Naval Disarmament Treaty was denounced by Japan on December 29, 1934, to take effect according to the terms of the treaty in two years. The fact that the Nine Power Treaty was an independent instrument, had no provisions for denunciation and was not expressly contingent on the effectiveness of any other of those treaties or resolutions indicates that legally its validity is not affected by the fate of those instruments.[72] There is no evidence that manifestation by the parties to the treaty of a disposition to co-operate with Japan in solving its economic problems or in gaining general acceptance of racial equality, was a condition which moved the parties to enter into the treaty. Nor is there evidence that willingness of the parties to co-operate in the solution of Far Eastern problems generally, or even in the solution of problems concerning the application of the provisions of that treaty, was a condition of its validity.

[70] See Senator Lodge, *Cong. Record*, March 8, 1922, Vol. 62, pt. 4, p. 3552. See also Akagi, *op. cit.*, pp. 371-3.

[71] France refused to ratify the treaty because of the limitations which it imposed upon the use of submarines in commercial warfare. For French attitude at the conference see, *Conference on Limitation of Armament*, Washington, 1922, pp. 486, 504ff, 649ff; Benjamin Williams, *The United States and Disarmament*, N. Y., 1931, pp. 149-50, 218-9; R. L. Buell, *The Washington Conference*, N. Y., 1922, pp. 215-34; Yamato Ichihashi, *The Washington Conference*, Stanford, 1928, pp. 72-82; Q. Wright, "The Washington Conference," *Minnesota Law Review*, March 1922, pp. 285, 290; *Am. Pol. Sci. Rev.*, May 1922, Vol. 16, pp. 288, 291-2. France, however, accepted a similar limitation upon the use of submarines in the London Naval Treaty of 1930 (Art. 22) and upon the use of poison gases in the protocol to the Geneva arms limitation treaty of 1925, both of which are now (September 1939) in force, the submarine treaty among 41 states, including Great Britain, France, Italy, United States, Japan, U.S.S.R., Germany and Poland, and the poison gas treaty among 44 states including Great Britain, France, Italy, U.S.S.R., Germany, Poland and China. See Manley O. Hudson, *International Legislation*, Vol. 3, p. 1,670; Vol. 5, p. 417; *U. S. Treaty Series*, No. 830; *U. S. Treaty Information Bulletin.*

[72] The notes of denunciation and comments by Secretary Hull and the Japanese Ambassador on occasion of denunciation of the Naval disarmament treaties contain no suggestion that this affected the validity of other of the Washington treaties. (U. S. Dept. of State, *Treaty Information Bulletin*, No. 63, Dec. 1934, pp. 4ff.)

In any case an allegation that essential conditions upon which the treaty was based had changed does not automatically terminate a treaty nor give the power making the allegation the privilege of terminating it. Such an allegation has no legal effect until an appropriate international procedure has been invoked and an opinion has been rendered on the correctness of the allegation. The Research in International Law refers to "a competent international tribunal." The Nine Power Treaty does not provide a tribunal for its own interpretation but it does provide for full and frank communication among the parties on any situation involving the application of the stipulations of the treaty. This would seem to require a consultation upon any allegation that changed conditions had arisen to terminate the application of the treaty.

No state has formally alleged that changed conditions have invalidated the treaty, but Japan refused on other grounds to attend the consultation called by Belgium to consider the application of the treaty in relation to existing hostilities in China. In spite of this refusal the conference was held at Brussels in November 1937. The resolution passed as a result of this consultation, far from considering that the treaty had become invalid, "strongly affirms the principles of the Nine Power Treaty as being among the basic principles which are essential to world peace and orderly progressive development of national and international life." While the conference adjourned to explore "all peaceful methods by which a just settlement of the dispute may be attained, consistent with the principles of the Nine Power Treaty, and in conformity with the objectives of that treaty," it affirmed that "the conflict in the Far East remains a matter of concern to all the powers assembled at Brussels—by virtue of commitments in the Nine Power Treaty or of special interests in the Far East—and especially to those most immediately and directly affected by conditions and events in the Far East. Those of them that are parties to the Nine Power Treaty have especially adopted a policy designed to stabilize conditions in the Far East, and, to that end, are bound by the provisions of that treaty, outstanding among which are those of Articles I and VII."[78]

The scope of the obligation of the parties to the Nine Power Treaty to co-operate in its enforcement has been controversial.

[78] *Dept. of State Press Releases*, Nov. 27, 1937, p. 400.

Legally, Article VII obliges the parties to do no more than exchange views and does not limit their freedom to act independently in any emergency involving the application of the treaty, but it has been contended that the parties "are committed . . . by the spirit of the Washington agreements to the principle of co-operative action."[74] In fact, the powers did act co-operatively in Far Eastern matters after the Washington Conference until the end of 1926. This co-operative spirit was manifested in the Customs Revision Conference of 1922, the Tariff Conference of 1925, the Extraterritoriality Commission of 1925, the Canton Customs Modification Conference of 1923, the May 30th incident of 1925 and the Taku Fort incident of 1926. The first three of these manifestations had been explicitly provided for in resolutions of the Washington Conference. The others were of the nature of collective police measures to protect treaty rights against Chinese encroachments.

Beginning with the British note of December 1926, aimed at broadening the spirit of co-operation to alleviate unequal burdens upon China, the spirit of co-operation in fact diminished.[75] The powers dealt independently with China in the Nanking episode of 1927, the revision of customs treaties and the negotiations on extraterritoriality. In these matters, where collaboration might have resulted in a common front of all the powers against the Chinese national program, the United States seems to have acquiesced, if it did not indeed take the lead, in breaking up the spirit of co-operation.[76] When later the United States wished to revive co-operation under the Nine Power Treaty in order to frustrate Japanese aggressions, in January 1932, the British were unsympathetic, and whatever co-operation developed at this time was under the Pact of Paris and the League of Nations Covenant.[77]

In the renewed Japanese hostilities of July 1937, the Nine Power Treaty was explicitly alluded to in the League of Nations resolutions of October 6, 1937, and September 30, 1938, Japan having ceased to be bound by the Covenant, and on the initia-

[74] S. K. Hornbeck, "China and American Foreign Policy," *Annals of American Academy of Political and Social Science,* July 1928, p. 37.

[75] A. J. Toynbee, *Survey of International Affairs, 1926,* pp. 330ff.

[76] C. P. Howland, *Survey of American Foreign Relations, 1930,* p. 142; A. J. Toynbee, *op. cit., 1928,* p. 425.

[77] H. L. Stimson, *The Far Eastern Crisis,* pp. 95ff.

tive of Belgium a conference was held at Brussels in November 1937 on the basis of the Nine Power Treaty.

4. *Pacific Settlement Treaties.* Pacific settlement treaties deal with procedures of adjudication, arbitration, inquiry, conciliation and conference; with prohibitions against war and aggression; with the settlement of particular controversies; and with the codification of rules of international law to assist in the peaceful settlement of disputes and to ameliorate the rigors of war.[78]

Bipartite treaties of this type are notably absent in the relations of China and Japan. China has arbitration treaties with the Netherlands (1915) and the United States (1931) and a conciliation treaty with the United States (1914). Japan denounced its treaty of arbitration and conciliation with the Netherlands (1933).[78a] China and Japan are bound to each other by no bilateral treaties of arbitration or conciliation, and by only one regional treaty, the consultative provision of the Nine Power Treaty already referred to. Among general treaties, China and Japan are bound only by the voluntary provisions in the Hague Convention setting forth procedures for mediation, inquiry and arbitration, but not requiring the parties to use them.[79] China and Japan have settled some specific incidents by agreement, but none by any form of international adjudication since 1874. Each has submitted a few disputes with other powers to arbitration.[80] Mediatorial and conciliatory procedures of Articles 11 and 15 of the League of Nations Covenant were resorted to unsuccessfully in the Manchurian dispute of 1931. China invoked the procedure of Articles 10, 11, and 17 of the League

[78] The *U. S. Treaty Information Bulletin* classifies this type of treaty under the head "Promotion of Peace."

[78a] Feb. 12, 1940, on the ground that it provided for reference to the Permanent Court of International Justice in which Japan no longer took part. *Bulletin of International News,* Feb. 24, 1940, p. 258.

[79] See Q. Wright, *Diplomatic Machinery of the Pacific Area,* 1936, p. 13.

[80] China has been involved in 8 such arbitrations and Japan in 3. *Ibid.,* p. 13. Japan won the first two of its arbitrations, that with China in 1874 concerning the murder of Japanese in Formosa, and that with Peru in 1875 concerning the liberation of slaves from the Maria Luz, but it lost the Japanese house tax case against France, Germany and Great Britain before the Hague Court of Arbitration in 1905 "which decision was bitterly criticized as being extremely prejudicial. Since this experience, Japan opposed the compulsory jurisdiction of such a court, and her attitude still remains unchanged." (Akagi, *op. cit.,* p. 462.) See also W. E. Darby, *International Tribunals,* London, 1904, pp. 798, 800, 903; Scott, *Hague Court Reports,* pp. 77ff.

Covenant in the hostilities of 1937, Japan having ceased to be a member in 1935.[81]

Nonaggression provisions are also absent in the bipartite treaties between China and Japan, though both are bound by the Kellogg Pact and each has nonaggression provisions in treaties with the Soviet Union.[82]

Considering the lack of pacific settlement obligations between China and Japan and in the relations of each of these states with most other states of the world, the non-membership of the United States in the League of Nations, the non-membership of the Soviet Union in this institution until 1934, the withdrawal of Japan in 1935, and the lack of concrete procedures for pacific settlement in the Nine Power Treaty and the Pact of Paris, it may be said that machinery for pacific settlement of Far Eastern problems has been inadequate in law as well as in fact.[83]

5. *Commercial treaties.* Commercial treaties deal with general rights of commerce and navigation, with civil and residential rights of merchants, missionaries and other nationals in foreign territory, with consuls, courts and other institutions for assisting and protecting commercial activities, and with customs duties and other taxes affecting commerce.

Sino-Japanese commercial treaties extend Japanese trading rights in Chinese ports and accord to Japan extraterritorial jurisdiction in China on the basis of most favored nation clauses. Japan has also acquired residential areas in certain Chinese ports. These treaties are unequal and non-reciprocal and have no provisions clearly permitting termination by China, in this respect resembling the treaties which China had already made with great Western powers.[84] The United States,[85] Great

[81] See Chinese Communication to the League, Sept. 12, 1937; Rubinow, *op. cit.*, p. 35. The League actually considered the case under Art. 3, sec. 3, of the Covenant which authorizes the Assembly "to deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world," but cannot eventuate in obligations to apply sanctions as might be the case with Articles 10 or 17.

[82] China-U.S.S.R., May 31, 1924, Art. 6; and August 21, 1937; Japan-U.S.S.R., Jan. 20, 1925, Art. 5.

[83] Wright, *Diplomatic Machinery of the Pacific Area*, p. 25.

[84] The principal treaty is that of July 21, 1896, in large measure superseding those of Sept. 13, 1871, and November 26, 1875, and supplemented by treaties of October 8, 1903, looking toward eventual abolition of extraterritoriality, and of May 6, 1930, abolishing the Chinese treaty tariff. The standard collection of Far Eastern treaties is J. V. A. MacMurray, *Treaties and Agreements with and Con-*

Britain[86] and France[87] still enjoy similar treaty privileges in China under commercial treaties, but China terminated the unequal treaties with Germany and Austria as a result of the World War,[88] and with Russia after the Soviet revolution.[89] China has succeeded in making treaties, equal in principle, with the rest of the treaty powers,[90] although in most cases extraterritoriality

cerning China, 1894-1919, N. Y., Carnegie Endowment, 1921, with a less complete supplemental volume, *Treaties and Agreements with and Concerning China, 1919-1929,* Washington, Carnegie Endowment, 1929. The Japanese Foreign Office published *Treaties and Conventions between the Empire of Japan and other Powers* in 1884 and *Recueil des Traités et Conventions conclus entre L'Empire du Japon et les puissances étrangères* in 1918. W. F. Mayers edited *Treaties between the Empire of China and Foreign Powers* in 1877, and the 5th edition appeared in 1906. Apart from these, the earlier treaties can be found in the well-known collections, *British and Foreign State Papers,* Martens, *Recueil Générale des Traités,* and in the national treaty collections of various states, such as Malloy, *Treaties, Conventions, etc., of the United States,* 3 vols., 1909, 1923, and Miller, *Treaties and other International Acts of the United States,* which is the definitive Department of State edition not complete at this writing. Recent treaties can usually be found in the *League of Nations Treaty Series* and in the *China Year Book.* The latter also prints a list of Chinese treaties with all the powers (1938, p. 91ff.). Tyau (*op. cit.,* pp. 215ff.) prints an analysis of all China's treaties in existence in 1917.

[86] The original American treaty of July 3, 1844 (Wanghia), was in considerable measure superseded by the treaties of June 18 and Nov. 8, 1858. These were modified by the Burlingame treaty of July 28, 1868, and the treaty of November 17, 1880, and in considerable measure superseded by the treaty of Oct. 8, 1903. The treaty tariff was abolished by the treaty of July 23, 1928.

[86] The original British treaties of August 29, 1842 (Nanking), and Oct. 8, 1843 (The Bogue), were in considerable measure superseded by the treaty of June 26, 1858 (Tientsin). This was supplemented by the treaty of September 5, 1902, and by that of December 20, 1928, recognizing Chinese tariff autonomy.

[87] The original French treaty of Oct. 24, 1844 (Whampoa), was in a measure superseded by the treaty of June 27, 1858, which was supplemented by that of December 22, 1928, abolishing the treaty tariff.

[88] Germany renounced privileges in China by Articles 128-34 of the treaty of Versailles, July 28, 1919. China did not ratify, but Germany confirmed the renunciation and concluded equal commercial arrangements with China by exchange of notes on May 20, 1921. Austria renounced privileges by Articles 113-17 of the Treaty of St. Germain, Sept. 10, 1919, and Hungary by Arts. 97-101 of the treaty of Trianon, June 4, 1920, both of which China ratified.

[89] The Sino-Soviet treaty of May 31, 1924, confirmed Soviet renunciation of imperialist treaty provisions (Arts. 3, 4) and explicitly relinquished "extraterritoriality and consular jurisdiction" (Art. 12).

[90] Stanley K. Hornbeck writes: "The term 'Treaty Powers' is generally used to designate those powers which have extraterritorial privileges, not all of the countries which have treaty relations with China. The following treaty powers signed the Boxer Protocol: Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Japan, Netherlands, Russia, Spain, United States. Germany and Austria-Hungary lost their extraterritorial privileges during the war, and Russia was deprived of her rights by China in 1920. Today (1927), the following countries are generally listed as treaty powers: Belgium, Brazil, Denmark, France, Great Britain, Italy, Japan, Mexico, Netherlands, Norway, Peru, Portugal, Spain,

continues under the most favored nation clauses until there has been a general termination of this régime in China.[91] China claimed the power to terminate these treaties according to the provisions relating to revision[92] in the treaties themselves, or to the doctrine of changed conditions (*rebus sic stantibus*),[93] and declared that extraterritoriality came to an end in China on January 1, 1930, but the powers have not acquiesced and China has not pressed the matter since 1931.[94] The bipartite and regional treaty provisions establishing a fixed Chinese tariff were eliminated by treaties in 1928-30.[95]

Japan made unequal commercial treaties providing for extraterritorial jurisdiction with the principal powers after the initial treaty of this type had been negotiated with Commodore Perry in 1854. Efforts were made to revise these treaties as early as 1871, but without success until after the war with China in 1895. New treaties were then negotiated under which extraterritoriality was eliminated after 1899.[96]

Japan now has commercial treaties with all countries of commercial importance, in general providing for most favored nation treatment on matters of commerce and navigation and reciprocal assurance of national treatment to resident merchants of the other country. They are in general subject to termination on six months notice.[97]

Sweden, Switzerland, and the United States." (*China Today: Political*, World Peace Foundation Pamphlets, 1927, Vol. 10, p. 448.) All of these states ratified the Nine Power Washington Treaty except Brazil, Peru, Spain and Switzerland. Bolivia also ratified it and Germany signed an adherence but did not ratify it. (See Stimson letter to Borah, Feb. 23, 1932, Willoughby, *op. cit.*, p. 251.)

[91] See Chinese treaties with Sweden, 1908; Switzerland, 1918; Italy, Nov. 27, 1928; Belgium and Luxembourg, Nov. 22, 1928; Denmark, Dec. 12, 1928; Spain, Dec. 27, 1928. Equal treaties had been made with Austria, Oct. 19, 1925; Poland, May 19, 1928; Greece, May 26, 1928; Germany, 1928; Latvia, June 25, 1936; Turkey, April 4, 1934; Bolivia, 1919; Persia, 1920.

[92] These provisions are analyzed in detail by Blakeslee, *The Pacific Area*, 1929, pp. 34-44.

[93] *Ibid.*, pp. 39-41.

[94] Morse and MacNair, *op. cit.*, p. 754. Great Britain wrote that it "was willing to agree that January 1, 1930, should be treated as the date from which the process of gradual abolition of extraterritoriality should be regarded as having commenced in principle." Japan and the United States agreed to this formula.

[95] Norway, Nov. 12, 1928; Netherlands, Dec. 19, 1928; Sweden, Dec. 20, 1928, in addition to those mentioned in notes 85-90.

[96] Tatsuji Takeuchi, *War and Diplomacy in the Japanese Empire*, N. Y., 1935, pp. 91ff.

[97] The texts of Japan's principal commercial treaties in force are conveniently collected in *Japan Year Book, 1938-39*, Tokyo, 1938.

The commercial treaty made with Russia in 1907 was terminated through notice by Russia in 1918, but in 1925 Japan concluded a treaty with the Soviet Union which provided that the Treaty of Portsmouth (1905) remain in force, and re-established commercial intercourse on the basis of non-discrimination and most favored nation treatment.

The treaties with Great Britain, France and Germany made in 1911 and with Italy in 1912 are still in force. The United States denounced its treaty of 1911 on July 26, 1939, to take effect in six months.[98] These treaties provided for reciprocal *unconditional* most favored nation treatment with respect to commerce and navigation except that with the United States which provides for *conditional* most favored nation treatment. In view, however, of the fact that the United States had concluded unconditional treaties with many countries, its commercial relations with Japan have in recent years been on the unconditional most favored nation basis. Although the United States has not concluded a special commercial reciprocity treaty with Japan, it has extended to Japan the benefits of such treaties made with other countries. By the treaty of 1921, dealing with Japanese mandated islands, the United States was entitled in these islands to the privileges granted under the treaty of 1911 and, in addition, to certain special privileges connected with electrical communications in the island of Yap.[99]

These treaties in general confer privileges only in the territories of the respective parties and therefore are not involved in current controversies concerning Japanese discriminations in occupied areas of China, although the latter may involve violation of the Nine Power Treaty providing for the open door in China and perhaps Article 43 of the Hague Convention concerning rules of war on land which requires that "a military occupant must respect, unless absolutely prevented, the laws in force in that country."[100]

[98] U. S. Department of State, *Bulletin,* July 29, 1939, Vol. I, p. 81.

[99] *U. S. Treaties, Conventions, etc.,* Vol. 3, pp. 2,723-8; Q. Wright, *Mandates under the League of Nations,* Chicago, 1930, p. 452.

[100] See U. S. note to Japan, Oct. 6, 1938, Dept. of State, *Press Releases,* Oct. 29, 1938, Vol. 19, p. 283. On relation of commercial treaties to embargoes as measures of reprisal, neutrality or sanction, see Q. Wright, "Legal Status of Economic Sanctions," *Amerasia,* Feb. 1939, p. 569; Philip Jessup, "Toward Further Neutrality Legislation," *Am. Journ. Int. Law,* April 1936, Vol. 30, pp. 262ff.; E. M. Borchard, "Neutral Embargoes and Commercial Treaties," *ibid.,* July 1936, Vol. 30, pp. 501ff.; J. Westlake, *International Law,* Vol. 2, p. 6; W. E. Hall, *Interna-*

6. *Administrative treaties.* Administrative treaties provide for co-operation in common interests, for the creation of unions with a legal status defining such interest, and for rules, regulations, procedures and institutions to make such co-operation effective.

China and Japan are parties to numerous agreements for the exercise by Japan of administrative authority in China. There are also numerous similar privileges given in Chinese loan and concession agreements to Japanese banks and corporations, especially in Manchuria. Such treaties, agreements and contracts exist between China and the other "treaty powers" sometimes in the form of bilateral treaties or agreements, sometimes in the form of collective agreements by China with all or some of the treaty powers, sometimes in contracts with bankers from many of them.

This body of administrative agreements providing for concessions and settlements, railroads, river control, administration of revenues and services often have permitted or been implied to permit foreign policing and exercise of foreign jurisdiction in Chinese territory. They constitute impairments of China's independence and administrative entity. As already noted,[101] under the aegis of extraterritoriality such agreements and contracts have often been given an interpretation permitting the exercise of jurisdiction where under general principles of international law only economic rights should be implied. Furthermore, sometimes privileges grew up in practice not justified by any written instrument at all.[102] Some of these privileges have been terminated in pursuance of the Washington Conference resolutions and as a result of the drive of the Nationalist government against foreign encroachments on Chinese independence since

tional Law, 8th ed., p. 433; L. Oppenheim, *International Law,* Vol. 2, sec. 38; Report of Legal Subcommittee of League of Nations Sanctions Committee, Oct. 19, 1935, reprinted in Q. Wright, ed., *Neutrality and Collective Security,* Chicago, 1936, p. 218. Practice of United States and other states in imposing embargoes on trade with countries engaged in hostilities in Chaco (1933), Ethiopian (1935), Spanish (1937), European (1939), and previous wars in spite of commercial treaties with these countries, Manley O. Hudson, *Report on International Regulation of the Trade in and Manufacture of Arms and Ammunition,* U. S. Senate, Special Committee Investigating the Munitions Industry, 73rd Cong. 2nd Sess., No. 1, pp. 54ff.; Harvard Research in International Law, "Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War," Commentary to Art. 11, *Supp., Am. Journ. Int. Law,* July 1939, Vol. 33, pp. 281ff.

[101] Chap. 1, *supra.*

[102] *Ibid.*

1928. This process of emancipation, however, was ended by the Chinese hostilities with Japan in 1931.[103]

Japan at an earlier time was bound by treaties according foreign powers certain administrative rights in Japanese territory, but these have been terminated since 1899.[104]

China and Japan are both parties to many of the international unions, especially those dealing with postal, telegraphic and radio services, opium and health, patents and copyrights, slavery and labor standards. Japan began to join such unions in the 1870's.[105] China did not generally participate in them until after the establishment of the Republic in 1911.[106]

[103] *Supra,* notes 91-4.

[104] Morse and MacNair, *op. cit.,* pp. 380-1; Tatsuji Takeuchi, *War and Diplomacy in the Japanese Empire,* N. Y., 1935, Chap. 9; F. C. Jones, *Extraterritoriality in Japan,* New Haven, 1931. Japan did not fully recover tariff autonomy until 1911. (Takeuchi, *op. cit.,* p. 107.)

[105] Japan became a member of the Universal Postal Union on June 1, 1877, and the Telegraph Union on July 28, 1879.

[106] China did not become a member of the Universal Postal Union until February 5, 1914.

CHAPTER VII

CONCLUSION

The writer has attempted to set forth in this memorandum the existing legal situation in the Far East as indicated by the accepted sources of international law—treaties, custom, legal maxims, judicial decisions and juristic writings.[1] The adequacy of the law as it is and the political expediency of changing rights which exist under it have been dealt with only incidentally.

The idea of jural law implies that events may occur and facts may persist contrary to what the law prescribes. Jural law is not like scientific law which must be restated whenever facts are observed which do not accord with its formulations. Lack of harmony between what must be according to law and what is according to observation has been notorious in the Far East, and an attempt has been made to analyze the factors which account for the failure of the law to control the facts.[2]

This problem of re-establishing harmony between law and facts has been discussed in popular controversy under the head of recognition and non-recognition. Partisans have aligned themselves behind the non-recognition doctrine, which favors modifying facts to accord with law, or behind the *de facto* doctrine which favors modifying law, immediately or very soon, after military or political action has succeeded in creating a new situation in violation of legal rights.

The writer has merely stated the existing obligations with respect to recognition, as evidenced by treaties in force and by the interpretation of these treaties and of general international law by governments and international institutions.[3] Memoranda by Professor Lauterpacht, Professor Borchard and Miss Morrison and the report of a special round-table discussion on the topic at the Virginia Beach Conference dealing with the merits of these two points of view, are included in this publication.

[1] *Supra*, p. 25.
[2] *Supra*, pp. 7ff.
[3] *Supra*, pp. 3, 4, 16, 91, 95.

Professor Lauterpacht, resting on the familiar legal maxim, *ex injuria jus non oritur,* considers the doctrine of non-recognition well founded in international law and essential to the development of that law.

> The true and principal significance of the principle of non-recognition in relation to the Japanese action in China—as indeed in respect of any other internationally illegal action—is one of upholding the authority of international law against successful assertions of illegal force. The importance of that function in periods of general relaxation of the restraints of international law cannot be overestimated.[4]

Professor Borchard, impressed by the failure of the doctrine to achieve the results hoped from it, believes it ought to be abandoned. He writes:

> The doctrine of non-recognition would seem to make no constructive contributions to a disordered world, but on the contrary, embodies potentialities for further disequilibrium.[5]

The conclusions of the Virginia Beach round table were less optimistic for the doctrine than those of Professor Lauterpacht and less pessimistic than those of Professor Borchard.

> For the time being, the majority considered it desirable to maintain the obligations and policies of non-recognition already accepted and to support the doctrine, in the hope that the transition through which the world is passing can be made to yield a more effective international organization within which the non-recognition of *ultra vires* acts will be an essential element.[6]

It seems appropriate that the writer should add a few remarks on these opinions, and on the general problem of better establishing a régime of law in the Far East.

He agrees with the conclusions on policy of the Virginia Beach special round table and accepts the legal construction that "under customary international law, there is no duty to refrain from recognizing changed conditions, which have been established in fact, in the sense that the opposing party has abandoned active resistance," but that "the parties to the League of Nations Covenant, the Argentine Anti-War Treaty, the Inter-American Treaty on Rights and Duties of States (and he would add the Nine Power Treaty and the Pact of Paris) have accepted obligations not to recognize territorial changes

[4] *Infra,* p. 154.
[5] *Infra,* p. 178.
[6] *Infra,* p. 184.

resulting from external violence against any party to the treaty." He also accepts the construction that:

> Recognition has the legal effect of waiving whatever legal opposition the recognizing state might be able to make to the assertion by another state of a new legal title (and) therefore, appears to be a quasi legislative procedure whereby an *ultra vires* act may lead to the results desired by the state resorting to such act, because of a waiver of their objections by all states with a legal power to object.[7]

Professor Lauterpacht realizes,[8] as did the Virginia Beach round table, that "the maxim *ex injuria jus non oritur* requires considerable qualification." The writer agrees with the latter in giving a wider scope to this qualification because:

> The legal significance of non-recognition flows from the legal interests in a given situation of the states which withhold recognition, rather than from the illegality of the acts which have led to the assertion of title. Such acts may be illegal, in the sense that they provide the basis for a claim for damages by other states, even though they do not confer a power upon other states to frustrate the results achieved. An act may be in breach of obligation and yet not *ultra vires*.[9]

This difference in respect to the principle which gives legal consequence to the non-recognition of changes which have been asserted, does not imply differences with respect to the value of the maxim as the justification for assuming certain obligations of non-recognition, or with respect to the political expediency of maintaining such obligations in the present world situation.[10]

[7] *Infra*, pp. 181, 182. See also *infra*, p. 131.

[8] *Infra*, pp. 139, 140.

[9] *Infra*, p. 181. See also p. 91, note 28 *supra*.

[10] The distinction may be illustrated from the Pact of Paris. The obligation not to recognize fruits of aggression flows, in the writer's opinion, from the explicit obligation of the parties to the Pact "to *condemn* resort to war for the solution of international controversies." This is believed to be incompatible with the *approval* of the results of war involved in such recognition. No such duty of non-recognition can be drawn directly from the aggressor's breach of its obligation "to renounce war as an instrument of national policy" and not to seek "the settlement or solution" of any "dispute or conflict except by pacific means." The duty to "condemn recourse to war," however, may have been undertaken because of the conviction of the parties to the Pact that rights ought not to arise from wrongs. The refusal to recognize fruits of aggression, if general, would frustrate the establishment of such rights because a possession by violence does not, in itself, establish a title under international law, and title will only develop if all those with a legal interest in the subject matter acquiesce. Since the legal interests of all parties to the Pact are affected by violent seizures in breach of the Pact, a refusal by any of them to recognize constitutes a flaw in the title.

The writer appreciates the value of Professor Borchard's résumé indicating the wide variability of policies with respect to recognition and non-recognition in the practice of the United States, of the Latin-American states and of the European states during the past century and a half. He would not, however, draw from this the conclusion, which Professor Borchard suggests, that recognition has or ought to be accorded or refused only upon the establishment by objective criteria of the "facts" of a new situation. Professor Borchard points out that even observance of the so-called "*de facto* theory" has been motivated by "subjective considerations." He writes:

> The United States, eager to extend a helping hand to its Latin-American imitators, was largely responsible for determining the objective indicia of recognition, namely, actual control of the government, effective establishment of the new state.[11]

When other "subjective considerations," such as the desire to prevent others from recognizing the Confederacy, the desire to preserve order in Latin-America, the desire to augment the prestige of democracy, to maintain respect for international law, to discourage resort to international violence were dominant in the politics of the United States or of other countries, quite different criteria for granting or withholding recognition have been set forth.

Incidentally, Professor Borchard quite ignores the distinction between criteria of non-recognition based on a breach of international law or a treaty (alone involved in the Stimson Doctrine), and the criteria based on a breach of the constitutional law of a particular state which were at issue in the post-Napoleonic doctrine of legitimacy. It is of course only with respect to the former that the maxim *ex injuria jus non oritur* can have a bearing in international law.[12]

Courts, far from regarding recognitions, whether of new states, new governments, belligerency, or acquisitions of territory,[13] as matters of fact, have regarded them as "political ques-

[11] *Infra*, p. 160.

[12] The two criteria were related by the Tobar doctrine which proposed to incorporate a duty not to recognize revolutionary governments in a treaty, a step actually taken in the Central American conventions of 1907 and 1923. (*Infra*, p. 165.)

[13] Professor Borchard writes: "The idea that annexation requires express recognition of the expansion is an essential part of the post war formula designed to hold down the status quo." (*Infra*, p. 161.) Recognition may be given tacitly as well as expressly, but in the past as well as in recent times, it has occasionally been given expressly in cases of annexation. The courts have always re-

tions" upon which they would follow the political organs of the government.[14] Even the Institute of International Law, though attempting to set forth certain objective criteria for recognition, considered, as Professor Borchard points out,[15] that "recognition is more political than juridical in nature," and Professor Borchard himself acknowledges that "a state is privileged not to recognize established facts."[16] In adding that "this is a political judgment, an act of reprisal or intervention entailing the consequences of such unfriendly act," he appears both to contradict himself,[17] and to go beyond the law and the facts, for refusals to recognize have been common in the past and have seldom given rise to legal protests or to hostilities.[18] While the premature recognition of a new state, a new government or a territorial acquisition would

garded territorial acquisitions, whether by their own or by foreign countries, as matters in which the attitude of the political organs of the government control, and in the same category as recognitions of new states and governments. "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive." Jones vs. U.S., 137 U.S. 202, 214 (1890), citing U.S. vs. Reynes, 9 How. 127; Kennett vs. Chambers, 14 How. 38; Hoyt vs. Russell, 117 U.S. 401, 404; Coffee vs. Grover, 123 U.S. 1; State vs. Dunwell, 3 R.I. 127; State vs. Wagner, 61 Maine, 178; Taylor vs. Barclay, 2 Sim. 213; Emperor of Austria vs. Day, 3 DeG., F. and J. 217. See also Williams vs. Suffolk Insurance Co., 13 Pet. 415, 1839. in regard to sovereignty of the Falkland Islands; United States note of Feb. 28, 1913 (Malloy, Treaties of the U.S., Vol. 3, p. 2698) in regard to Italian annexation of Libya; Moore's *Digest*, Vol. 1, p. 745, and *infra*, pp. 131, 132.

[14] Moore's *Digest*, Vol. 1, pp. 744ff.

[15] *Infra*, p. 171.

[16] *Infra*, p. 175.

[17] Because if an act is "privileged" it is not "illegal" as would be an act of "intervention" in most cases. "Its essence," wrote "Historicus" of intervention, "is illegality and its justification is its success." (*Letters of Historicus on some Questions of International Law:* London, 1863, p. 41). See also C. C. Hyde, *International Law*, Boston, 1922, Vol. 1, page 117; *Moore's Digest*, Vol. 6, pp. 2ff.

[18] Professors Lauterpacht and Borchard both mention many instances and J. B. Moore (*Digest*, Vol. 1, p. 72) mentions others, and writes: "Except in consequence of particular conventions, no state is obliged to accord it. But the refusal may give rise to measures of retorsion." Since "retorsion" refers to measures by nature legal, though undertaken to bring pressure, against acts of others which though disliked are, nevertheless, legal, this statement gives no support to the contention that non-recognition is an essentially illegal act like "reprisals or intervention." The Estrado doctrine may have had the object of making the recognition of *de facto* governments a legal obligation, but it had no reference to the recognition of new states, territorial changes or other circumstances involved in the Stimson doctrine. See Jessup, *Am. Journ. Int. Law*, 1931, Vol. 25, p. 719; and *infra*, p. 166.

doubtless be a breach of customary international law and an unfriendly act,[19] "practice indicates," as the Virginia Beach round table concluded, "that there is no positive obligation of international law to recognize changes which have been established in fact."[20]

Professor Borchard denies that "recognition is the expression of approval." He writes:

> Recognition has not, heretofore, been deemed the expression of a moral judgment of any kind, but the practical means by which in international relations an unchangeable condition of fact, objectively established, is taken into account.[21]

Without going into the question-begging character of the use of the word "unchangeable," the material assembled by Professor Borchard himself does not support this statement. For centuries the granting or withholding of recognition has been based on political as well as factual considerations. It has actually been considered an "expression of approval" by both those seeking it (like the United States in 1776, the Confederate States in 1861, Cuba in 1898, The Irish Republic in 1920) and those considering whether or not to accord it (like the United States in regard to the Latin-American Republics in 1820, in regard to Argentine and British claims to the Falklands in 1832, in regard to Texas in 1836, to Cuba in 1898, to Panama in 1903, to Czechoslovakia and Poland in 1918). The Stimson Doctrine, reiterating the notes of 1915 and 1921 with respect to the changes in the Far East,[22] did not seek to add to the political significance of recognition, but rather to subtract from it, by basing the political approval, inherent in recognition, upon considerations of general international law rather than of special political interest.

The writer differs from Professor Borchard not merely in the details of his argument, but in his basic thesis which indicates a profound pessimism with respect to the capacity of man to improve the world order by law. At the beginning of his essay he lays down five "misconceptions in theory and

[19] Past discussions of the propriety of recognitions have generally concerned premature rather than delayed recognitions. See *Historicus, op. cit.*, Chap. 1; *Moore's Digest*, Vol. 1, p. 73.

[20] *Infra*, p. 176.

[21] *Infra*, p. 158.

[22] *Supra*, p. 3.

fact which underlie the doctrine of non-recognition," on each of which a comment may be made.

(1) It is of course true that the international order is a "primitive order" but it is because it has remained a primitive order in a highly dynamic, industrialized and shrinking world that it is going to wreck.[23] A "primitive" legal order is only satisfactory where custom dominates behavior. It is from a realization of the necessity of making international law less primitive that new institutions, including the non-recognition doctrine, have engaged the attention of jurists and statesmen. These new institutions are not the cause of malaise, as Professor Borchard appears to suggest, but admittedly inadequate efforts to remedy it. Since the illness arises from the inadequacy of traditional legal and political institutions to meet the problems of a rapidly changing and interdependent world, it seems unlikely that abandonment of efforts to improve these institutions will effect a cure. If the inadequacy of a traffic control system is accountable for numerous accidents under conditions of the increasing speed and number of vehicles, one would not expect to ameliorate the situation by abandoning traffic control altogether.

(2) Professor Borchard suggests that it is impossible to tell "when a particular change, territorial or political, is 'legally' or 'illegally' effected." This appears to deny the existence of international law altogether. Every change in the relations of states is either "territorial or political," and it is the purpose of international law to provide criteria for judging such changes. A law which declined to distinguish between legal and illegal acts, but accepted whatever its subjects did as incapable of judgment, might be a scientific or sociological law but it would not be a jural law. Professor Borchard, it is true, admits that "states often challenge the legality of acts which directly affect them or their nationals," but he thinks "this has nothing to do with the doctrine of non-recognition of political changes."[24] But why is Mexican confiscation of British oil property any

[23] "It is manifest in retrospect that an epidemic of economic nationalism was the inevitable nemesis of letting the new œcumenical force of industrialism loose in a world in which parochial states were the reigning political institution." Arnold J. Toynbee, *A Study of History*, Vol. V, p. 175. See also Francis Delaisi, *Political Myths and Economic Realities*, N. Y., 1927; Eugene Staley, *World Economy in Transition*, New York, 1939.

[24] *Infra*, p. 176.

less political than Mussolini's invasion of Ethiopia? Or does Professor Borchard imply that the law will judge unimportant but not important political acts? There is of course evidence both in intranational and international relations that illegal behavior on a large enough scale may be exempt from legal control. But surely this does not redound to the credit of law nor does it promote justice or order. Practical experience has indicated little difficulty in getting substantial unanimity

volved in territorial seizures and the extinction of states. The problem has been in the realm of sanctions, not of judgment.

(3) As indicated, recognition has always been considered to manifest political approval of a change, as well as to acknowledge a fact, and refusal to recognize has often had important consequences, as for instance, in the failure of the Huerta government of Mexico and the Tinoca government of Costa Rica. It has had important effects *vis-à-vis* recent aggressions. Whether, if coupled with other devices, it might not constitute an important deterrent is still too early to say. The problem is one of political judgment, not of legal analysis.

(4) International law must rest, in the absence of obligatory arbitral and judicial institutions, on the willingness of states to pass upon the "legality of each others' acts, even when not directly affecting them." Otherwise it would provide no protection to the weak at all. Text writers recognize the right, if not the duty of states, to denounce violations of law, particularly violations of multipartite treaties of which they are members.[25] Clearly, if the members of the family of nations

[25] *Supra*, p. 85. The question of when an illegal act "directly affects" a state raises a difficult question. The Statute of the Permanent Court of International Justice permits any state which "considers that it has an interest of a legal nature which may be affected by the decision in the case" to submit a request to intervene as a third party (Art. 62) and it recognizes that all parties to a convention have such an interest in the construction of that convention. (Art. 63.) See also *supra*, p. 84. The Harvard Research Draft Convention on Neutrality recognizes that every neutral has an interest in case of violation of the neutral rights of any other neutral. (Art. 114, Supp. *Am. Journ. Int. Law*, 1939, p. 788.) Elihu Root thought every state ought to be able to "protest against the injury done to it by the destruction of the law upon which it relies for its peace and security." (*Supra*, p. 87.) Grotius and other writers have taken an even broader view of the interest of every state in any violation of international law. *Supra*, p. 83, note 1.

ignored all breaches of law, international law would soon disappear.[26]

(5) Professor Borchard's construction of the League of Nations Covenant and the Pact of Paris differs from that of governments and of official international agencies, when he presumes the legality of "treaties of peace" contrary to the obligations of these instruments. Article 20 of the Covenant is explicitly to the contrary, as is the Stimson and other interpretations of the Pact.[27] Whether the effort to give practical effect to the legal consequences of these general treaties, and to develop in international relations the usual private law principle that contracts made under duress are invalid, again involves a political question.[28]

Professor Borchard believes that law must have a very restricted field in international relations, and must not attempt to interfere with the historic practice of powerful states in overriding the rights of the weak. This ancient practice is more dangerous today than ever before because of the interdependence of peoples and the increasing destructiveness of totalitarian war. International law has attempted to erect new barriers for supporting right against might, perhaps too rapidly, but for those who prefer civilization to barbarism, the objective must seem worthwhile.

From the writer's point of view, certain changes in the Far Eastern situation are desirable. The analysis of the existing legal situation in that area indicates four types of relations between law and fact which may require modification.

(1) Military invasions and occupations were initiated by acts in violation of international obligation and are maintained, contrary to the rights, not only of Far Eastern but of Western states under international law.[29] These conditions must eventually be rectified, either by general recognition of a "new order" retroactively legalizing the situation, or by voluntary or compulsory withdrawal of troops from the areas where they are illegally operating. Clearly the latter would do more to re-

[26] See Q. Wright, "The Denunciation of Treaty Violators," *Am. Journ. Int. Law*, July, 1938, Vol. 32, p. 530; *infra*, p. 133.

[27] *Supra* note 3.

[28] See Harvard Research Draft on Treaties, Art. 32, *Am. Journ. Int. Law*, Supp., 1935, Vol. 29, pp. 1149ff.; Draft on Aggression, Art. 4(2), (3), *ibid.*, 1939, Vol. 33, pp. 889-896.

[29] *Supra*, p. 16.

establish respect for law than the former. It would, in the writer's judgment, contribute to the stabilization of the Far East. Transitional problems which would be raised are not minimized. The negotiation of agreements among the interested states might facilitate such withdrawals.

(2) Extraterritorial jurisdictions, concessions, leaseholds, military servitudes, protectorates and suzerainties, though based, for the most part, on valid legal instruments or on prescription, are not in accord with the general norms of modern international law concerning status, domain, nationality, and jurisdiction.[30] These conditions are of a type which developed in various parts of the world where states of materially different culture, economy and military power came into contact with each other. While instances of such servitudes still exist in other parts of the world, there has been a tendency to eliminate them everywhere, and the elimination of unequal treaties has been a major problem in the Far East for many years. Without denying that some of these conditions are still justified in the Far East, in the writer's opinion, most of them should be gradually terminated by legal process, usually involving the negotiation of bilateral or general treaties. Equality of states with respect to the rights flowing from status, domain, nationality, and jurisdiction seems, on the whole, a desirable objective in the modern world of national sentiment and economic interdependence.[31]

(3) Unreasonable discriminations by certain countries with respect to the migrants, commerce, and treaty relations of certain Far Eastern nations, while permissible under existing conceptions of domestic jurisdiction, do not accord with general principles of equity and reciprocity.[32] These conditions have arisen from historic events, racial prejudices, economic fallacies and political rivalries and, in the writer's judgment, should be gradually modified through changes in the laws,

[30] *Supra*, pp. 67ff.

[31] *Supra*, pp. 30, 89. E. D. Dickinson while "conceding that equality of capacity for rights (and equality before the law) is sound as a legal principle" properly insists that "complete political equality in the construction and functioning of an international union, tribunal, or concert is simply another way of denying the possibility of effective international organization." *The Equality of States in International Law*, 1920, p. 336.

[32] *Supra*, pp. 21-24, 96, 109-114.

renunciations of the unequal treaties, or modification of the foreign policies of the powers practicing such discriminations.

(4) The sovereign right of states to judge their own controversies, to arm without limit, to impose arbitrary restrictions upon their trade, and to deny fundamental rights of individuals within their jurisdiction, while permitted by general international law, is out of accord with the requirements of peaceful international relations in a highly interdependent and shrinking world. While treaties of arbitration, disarmament, commercial reciprocity and minority rights, designed to meet this problem, are less abundant in relation to the Far Eastern states than in other parts of the world,[88] this problem is not in any sense confined to those states. It is a part of the world problem of reducing the sovereignty of the nation-state by increasing the sphere and effectiveness of international law and organization.

[88] *Supra*, pp. 8, 20, 108. See also Q. Wright, "International Law and the World Order," in W. H. C. Laves, ed., *The Foundations of a More Stable World Order*, Chicago, 1941, pp. 107-134.

Part II

THE PROBLEM OF NON-RECOGNITION

THE PRINCIPLE OF NON-RECOGNITION IN INTERNATIONAL LAW

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THE DOCTRINE OF NON-RECOGNITION

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THE PRINCIPLE OF NON-RECOGNITION IN INTERNATIONAL LAW

The principal object of the present Memorandum is to set forth the place of the principle of non-recognition in international law. Its second purpose is to examine briefly, by way of a summary of conclusions, how that principle applies to the situation created by the invasion of China by Japan in 1931 and 1937.

The Basis of Recognition in International Law

International law acknowledges as a source of rights and obligations such facts forming part of international social reality as are not prohibited by international law. It acknowledges them as such in the sense that it imposes upon States the duty to treat them as a source of reciprocal rights and obligations. Thus, for instance, effective occupation of *terra nullius* in conformity with the rules of international law relating to acquisition of territory gives rise to a valid title and to a corresponding duty, on the part of other States, to recognize its international validity.[1] This correspondence of the lawful acquisition of title and the duty of other States to acknowledge it as such is a proposition so obvious that it appears to be tautologous. For a lawful acquisition would be meaningless unless it were accompanied by the right to have it acknowledged and respected. It is by reason of their obviousness that the forms of recognition other than those connected with statehood, governmental capacity and belligerency,[2] have not been prominent in international theory and practice.

[1] See below.

[2] These aspects of recognition, connected as they are with fundamental manifestations of the life of States, have hitherto been treated largely from the political and diplomatic rather than from the legal point of view. This means that according to what has probably been the view of the majority of international lawyers, the existence of factual conditions of statehood, of government authority, or belligerency do not impose a legal duty of recognition. It is believed that this attitude of the majority of international lawyers is not supported either by considerations of legal principle or by the bulk of the practice of States. The more accurate view, it is believed, is that the realization of conditions of fact identical with conditions of statehood as laid down in

On the other hand, it follows from the same principle that facts, however undisputed, which are the result of conduct violative of international law, cannot claim the same right to be incorporated automatically as part of international law. They do not impose upon other States the duty of recognition. These States may, if they so wish and if they deem it compatible with the maintenance of the authority of international law, recognize them as creating internationally valid rights as against themselves. If they do so it is a concession on their part which they are under no duty to grant. On the other hand, they may announce their intention to treat them as devoid of any validity in international law. They may go further and obligate themselves in mutually binding understandings not to validate in the future, as part of international law, the consequences of an unlawful act. Such a duty of non-recognition may follow indirectly from obligations of a different character previously undertaken. This differentiation between acts consistent with and those contrary to international law enables us to understand the principle of non-recognition in terms of the general doctrine of recognition conceived as an act of application of international law.

Recognition of New International Rights as a Condition of Their Validity

It has been pointed out that when the lawfulness of the acts giving rise to a new legal title or situation is clear and undisputed, the question of recognition or non-recognition does not arise. Recognition, *i.e.*, the treatment of the new title as valid, is respectively an obvious duty and an obvious right—so obvious that it is dispensed with in the normal course of international practice. In this sense it is true to say—and the practice

international law gives rise, respectively, to the right to recognition as a State and to the duty of recognition on the part of the existing States; that, although rebellion is treason in the eyes of municipal law, it imposes, when followed by the establishment of an effective government wielding power over the entirety of national territory with a reasonable prospect of permanency, a duty upon other States to recognize the change and to treat the new government as representing the State in the international sphere; and that for the same reason, even prior to and independently of the success of the revolutionary movement, once a rebellion has assumed dimensions of widespread hostilities in the form of a civil war as contemplated by international law, there arises the duty to admit the consequences of the situation thus created and to recognize a state of belligerency with all the rights appertaining thereto.

of States shows that this is the case—that recognition is not a condition of acquisition of new territorial or other titles. In connection with the doctrine of the balance of power recognition of colonial acquisitions has on occasions been sought and given, but, like the principle of the balance of power itself, it has been of political and not legal significance. The Congo Conference of 1885 established as between the contracting parties the duty of notification, but its purpose was not germane to the question of recognition. Its object was to prevent competing claims and to regularize this mode of acquisition of territory by stipulating for a certain amount of publicity.[3] However, from the fact that recognition is normally not necessary for the valid acquisition of new titles we must not draw the misleading conclusion that it is never necessary and always irrelevant. Recognition is unnecessary and irrelevant only when the lawfulness of the act giving rise to the pretended title is clear and undisputed—"lawfulness" meaning its conformity either with general international law or with particular legal rights of other States. But recognition of a new title acquires definite significance as soon as the legality of the act or the existence of the legal title on which the act is based becomes a matter of doubt or dispute. When this happens, recognition removes the uncertainty by acknowledging the conformity of the title in question with international law. In such cases recognition cannot naturally be regarded as the mere fulfillment of a legal duty. It is a combination of waiver of a competing claim and of an undertaking not to challenge the title in question in

[3] See Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), p. 300. In 1912, Italy obtained the express recognition by a number of States of her annexation of Tripoli and Cyrenaika. But she did not regard such recognition as being legally essential. When in September 1912 she approached the United States with a request for recognition, the United States Government replied that it was not its custom "to proceed in that manner, especially with regard to European affairs; that when the United States took over the Philippine Islands and Porto Rico, foreign governments were not asked for their acquiescence nor for their recognition, and none was given." It was pointed out that the United States was fully aware of what had taken place and that while it had no objection at all to the attitude of Italy, an express form of recognition could not be expected (*U.S. Foreign Relations*, 1913, p. 609). Implied recognition was granted by the fact that the appropriate United States diplomatic and consular representatives were instructed to conform to the legal situation established in Libya in connection with the abolition of extraterritorial rights.

the future. For this reason recognition of this type often contains qualifications expressly limiting its scope. Thus when Great Britain recognized in November 1930 Norwegian sovereignty over Jan Mayen Island, she stated that as she had no information concerning the reasons for the Danish decree extending Danish sovereignty to the island in question, the recognition was given "independently of and with all due reserves in regard to the actual grounds on which the annexation may be based."[4] When in August 1930 Norway informed the Canadian Government that she recognized the sovereignty of His Britannic Majesty over the Otto Sverdrup Islands, she expressly stated that the recognition in no way implied consent to the so-called "sector principle."[5]

The position is altogether different when the facts giving rise to the pretended new title are in violation of international law. In such cases recognition is a process differing *toto coelo* from recognition in other spheres. It is no longer an act of administration of international law; it is a political function. While not removing the moral or legal opprobrium attaching to the original illegality, it validates its consequences. It is against recognition of this nature that the policy or the obligation of non-recognition is directed. The illegal act in question may be in violation of the individual right of another State. In that case recognition is in the nature of a waiver of a right impaired by the attempted or consummated acquisition of the new title. Translated into simple language, the act of recognition in such cases amounts to saying: "Your pretended new title was in derogation of my legal right. As such it was contrary to international law. I therefore refused to treat it as valid and as establishing any legal right against me. I refused to recognize it. This I was perfectly entitled to do. But now I waive my right. Your new title is therefore no longer contrary to an internationally protected right of mine. It is no longer contrary to international law. I recognize it." When the acts in question are in breach of general international law as established by custom, recognition, as we shall see, assumes the character of a quasi-legislative measure in the general interest of international society and of international peace.[6]

[4] *U. K. Treaty Series*, No. 14, (1931), Cmd. 3192.
[5] *Ibid.*, No. 25 (1931), Cmd. 3815.
[6] See below, pp. 145, 146 and 147.

The Meaning of Non-Recognition

From the fact that recognition is not necessary for the validity of an otherwise legally unimpeachable title, we cannot properly draw the conclusion that *every* pretended acquisition of title is valid—and therefore in no need of recognition. This follows clearly from an examination of the legal nature of non-recognition of new titles or situations as distinguished from non-recognition of new States or governments. Refusal of recognition is, upon analysis, a declaration that the particular attempt to create the new title, treaty or situation is contrary to international law or, what is often the same, to the acquired rights of the non-recognizing State; that accordingly it is not a source of legal right; that it is a nullity; and that it is proposed to treat it as such in the future. The object of the policy or obligation of non-recognition is not to render illegal an otherwise lawful and valid act; its object is to prevent the validation of what is a legal nullity. This analysis of the meaning of non-recognition is based on two assumptions, both of which have been questioned. The first is that illegal acts cannot produce legal results beneficent to the wrongdoer. This objection is discussed below. The second criticism is that it is not competent for one State to pass judgment on the legality of the acts of another and that in the absence of an international tribunal passing impartial judgment on the legality of State action its alleged invalidity cannot be allowed to determine the validity of the new title.[7] It is difficult to admit the force of this criticism. If that criticism were not inconsistent with actual practice it would be somewhat pedantic; in view of the fact that refusal of recognition is a constant feature of State practice it must be described as inaccurate. Undoubtedly, it would be more satisfactory if there were an international court endowed with obligatory jurisdiction to decide questions relating to the legality of the conduct of States. But as there is no such obligatory jurisdiction of international tribunals, States themselves are constrained to pronounce judgment upon the legality of the actions of other States; the inescapable alternative would be for them to treat such acts invariably as valid and as establishing legal rights. The fact that interna-

[7] This particular criticism has been repeatedly voiced by Sir John Fischer Williams. See *Hague Academy, Recueil des Cours,* 44 (1933) (ii), pp. 282 *et seq.*; *Harvard Law Review,* 47 (1933-1934), pp. 787 *et seq.*

tional tribunals have no compulsory jurisdiction is admittedly an anomaly. But that anomaly does not result in an absurdity consisting in the duty of States to refrain from questioning the legality of actions of other States in any circumstances—unless, of course, we attach importance to the suggestion that as every State is in the habit of committing illegalities at some time or another it ill behooves it to assert an illegality in the conduct of other States.[8]

Announcement of Non-Recognition or of the Policy of Non-Recognition

The refusal to recognize titles, treaties and situations on the ground that they are inconsistent with the rights of the State refusing recognition is a constant feature of international practice. In the bulky volumes of J. J. Moser's *Versuche* and *Beytrage*, published in 1777 and 1778, respectively,[9] as well as in his more theoretical treatise (a somewhat pretentious term when applied to a chronicler of international events of Moser's type) published in 1763,[10] the student will find lengthy accounts and discussions of refusals of recognition in the seventeenth and eighteenth centuries. One of the earliest monographs concerning recognition arose out of a case of denial of recognition to an elected monarch.[11] The diplomatic history of the nineteenth and twentieth centuries supplies numerous examples of refusal of recognition on the ground of the inconsistency of the new title with existing obligations. It is sufficient to refer to two more recent instances. When Bosnia and Herze-

[8] ". . . nations are but aggregations of human beings, who may not relish daily reminders of their shortcomings by others whom they may not deem above reproach": Moore in *Harvard Law Review*, 50 (1937), p. 436.

[9] In the second book of Part I of *Versuch des neuesten Europäischen Volkerrechts in Friedens—und Kriegs-Zeiten* (1777) on the Sovereign Persons and Families, there are frequent references to recognition and refusal of new titles, etc., in Hereditary and Electoral Kingdoms. These cases are again referred to and discussed in *Beyträge zu dem neuesten Europäischen Völkerrecht in Fridens-Zeiten* (1778), Part I: Thronfolge in denen Erbreichen (pp. 81-267), Thronfolge in denen Wahlreichen (pp. 268-276), and Erkennung einer Titulatur (pp. 387-390).

[10] *Grundsatze des jetzt üblichen Europäischen Völker-Rechts in Fridens-Zeiten* (1763), where he discusses recognition, guarantee and non-recognition of succession to the throne (Chapter V), of new titles (*neue Würde*) acquired by force or treaties (Chapter VII) or revolution (Chapter VIII).

[11] See Mogen, *De eo, quo circa Imperantem agnoscendum est gentium; occasione denegatae agnitionis Aug. Imp. Francisi legitime electi e Rege Galliae ejusque Foederatis* (1748).

govina were annexed in 1908 Sir Edward Grey caused Austria-Hungary to be informed that "His Majesty's Government could not approve of an open violation of the Treaty of Berlin, nor recognize an alteration of it when the other Powers, and especially in this case Turkey have not been consulted."[12] He used similar language with regard to the Bulgarian proclamation of independence in contravention of the Treaty of 1878.[13] When in May 1915 Japan presented to China an ultimatum, subsequently accepted by that country, the United States communicated to China and Japan an identical Note which ran as follows:

> In view of the circumstances of the negotiations which have taken place and which are now pending between the Government of China and the Government of Japan and the agreements which have been reached as a result thereof, the Government of the United States has the honor to notify the Government of . . . that it cannot recognize any agreement or undertaking which has been entered into or which may be entered into between the Governments of China and Japan impairing the Treaty rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China or the international policy relative to China commonly known as the Open Door Policy.[14]

The British announcements of non-recognition in 1908 and the United States declaration in 1915 show the development of the principle of non-recognition in two directions. In the first instance, they signify the decision to refuse recognition not only on account of a violation of the particular rights of the State concerned, but also having regard to the violation of a general rule of international law as embodied in a treaty or in fundamental principles of international law relating to the respect of the independence of States. Secondly, some of the declarations in question, like that of the United States in 1915, referred not to any specific title claimed to have been acquired but, more generally, to possible future situations arising out

[12] Printed in Gooch and Temperley, *British Documents on the Origins of the War, 1898-1914,* Volume V, p. 390.

[13] *Ibid.,* p. 398 (in a telegram sent to the British Agent and Consul-General in Sophia). See also Lord Rosebery, July 18, 1886, to the British Ambassador at St. Petersburgh concerning the abrogation by Russia of Article 59 of the Treaty of Berlin [as cited by McNair, *The Law of Treaties* (1938), p. 357].

[14] *U.S. Foreign Relations,* 1915, p. 146; MacMurray, *Treaties and Agreements with and concerning China,* Volume II (1921), p. 1236. For a similar declaration made by China in 1917 after the publication of the Lansing-Ishii Agreement see *U.S. Foreign Relations,* 1917, p. 270.

of a violation of certain treaties and principles. For an individual act of non-recognition there was thus substituted a policy of non-recognition of a more general scope. These were the features of the United States declaration of non-recognition issued on January 7, 1932, in the Note addressed by the Secretary of State, Mr. Stimson, to China and Japan. The declaration repeated almost literally the relevant passage of the Note of May 13, 1915, with the important addition that the United States "does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties."[15] The Note showed the principle of non-recognition as not limited either to any particular title or to the exclusive defence of the interests of the non-recognizing State. Non-recognition was being transformed into an instrument of general application—into a long-range determination not to validate the fruits of illegal acts.

Acceptance of the Obligation of Non-Recognition

However important the announcements and declarations of an intention or of a policy of non-recognition may have been, they left to the State in question full freedom of action in the future. They did not imply any *obligation* of non-recognition. Thus there is evidence that the announcement of the United States of January 7, 1932, was not intended as implying any such obligation. This fact, as well as general considerations of international law, dispose of the suggestion that that announcement was declaratory of an international duty which followed, *inter alia*, from the General Treaty for the Renunciation of War to which the United States, Japan and China were parties. This suggestion underlay, for instance, the Resolution of the International Law Association of 1932 which laid down, by way of a legal interpretation of the Treaty, that it is the duty of its signatories not to recognize *de jure* any territorial or other advantages acquired *de facto* by means of a violation of the Treaty.[16] It is not believed that the duty goes beyond

[15] *American Journal of International Law*, XXVI (1932), p. 342.

[16] For the text of the Resolution see *Transactions of the Grotius Society*, XX (1935), p. 205.

a moral obligation. A State signing a treaty does not automatically undertake a legal obligation to contribute to its enforcement by a refusal of recognition or otherwise.

A definite step toward transforming the policy of non-recognition into an obligation of non-recognition was made by the League of Nations in connection with the invasion of Manchuria by Japan. On February 16, 1932, the members of the Council other than China and Japan addressed a Note to Japan drawing her attention to the terms of Article X of the Covenant from which it appeared "to them to follow that no infringement of the territorial integrity and no change in the political independence of any member of the League brought about in disregard of this article ought to be recognized as valid and effectual by the members of the League of Nations."[17] On March 11, 1932, the Assembly of the League adopted a Resolution in which it "declares that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."[18]

It appears from the wording of the pronouncement of the Council and the Resolution of the Assembly that they were based on the view that non-recognition was a legal obligation binding upon the members of the League by virtue of the Covenant. In fact, the refusal to recognize a conquest accomplished in violation of the Covenant constituted the very minimum of the obligation to respect and to preserve the territorial integrity and political independence of other members of the League. This being so, it is unnecessary to pursue the controversy as to whether the Resolution of the Assembly, in addition to being declaratory of existing obligations, was in itself a source of obligation. The British Government, it appears, acted on the view that in the matter of recognition of the conquest of Abyssinia it was bound by an obligation of non-recognition, and in May 1938 it took steps to obtain a measure of release from that obligation. This punctilious attitude is of deeper significance than the further question whether, in view of the existing rule of unanimity, such release could be

[17] *Official Journal*, 1932, p. 383.

[18] *Ibid.*, Special Supplement No. 100, p. 8.

validly given except by a unanimous decision of the Assembly or of the Council.[19]

While the question whether the pronouncements of the League in 1932 amounted to a—declaratory or constitutive—obligation of non-recognition is controversial, a clear obligation to that effect was undertaken in Article 2 of the Anti-War Treaty of Non-Aggression and Conciliation of October 10, 1933 (often referred to as the Saavedra Lamas Treaty), concluded between a number of American States, including the United States. In that Article the contracting Parties declared that "they will not recognize any territorial arrangement which is not obtained through pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms."[20] In Article 11 of the Convention of Rights and Duties of States signed at Montevideo on December 26, 1933, "the contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure."[21] These collective

[19] At the meeting of the Council of the League in May 1938 Great Britain expressed the opinion that the question of recognition of the position of Italy in Abyssinia was one for each member of the League "to decide for itself in the light of its own situation and its own obligations" (*Official Journal*, 1938, May-June, p. 335). No formal decision was taken by the Council and there was no opposition to the President's statement at the end of the discussion that the great majority of its members concurred in the British view (*ibid.*, p. 346). Previously, on April 13, 1938, the Prime Minister of Great Britain stated in the House of Commons that His Majesty's Government "have in no way changed their view of the importance of the principles enunciated in the Assembly Resolutions . . . but in their application to any case His Majesty's Government must be entitled to take into account the attitude of other Members of the League and the facts of the international situation" (*House of Commons Debates*, Volume 334, Col. 1099). At the time when Great Britain requested that the matter be put before the Council, five Members of the Council had already recognized *de jure* the annexation of Abyssinia.

[20] Hudson, *International Legislation*, Volume VI, p. 450. This provision was recited in the Pan-American Convention of December 1936 concluded in order "to co-ordinate, extend and assure the fulfillment of existing agreements" between the American States [*American Journal of International Law*, Suppl., XXXI (1937), p. 59]. Previously, on August 3, 1932, nineteen American States sent identic Notes to Bolivia and Paraguay in connection with the Chaco dispute announcing their intention to apply to that dispute the principle of non-recognition enunciated earlier in the year by Mr. Stimson (Toynbee, *Survey of International Affairs*, 1933, p. 407).

[21] Hudson, *International Legislation*, Volume VI, p. 623.

obligations of non-recognition of consequences of acts contrary to international law constitute a new feature in international practice. They differ essentially from such obligations as those accepted in the declaration of the signatories of the Holy Alliance at Troppau on November 13, 1820,[22] or by the Central American States in 1907 and 1923, not to recognize internal changes or situations whose incidents are a matter of indifference for international law.

The Jurisprudential Basis of the Principle of Non-Recognition

Neither the announcement of non-recognition by the United States in January 1932, nor the Resolution of the Assembly of March of that year, nor the American Treaties of 1933, were intended to have or could have the effect of invalidating any act or the results thereof which but for the declaration of non-recognition would be valid. Their effect and probable intention was of a quite different nature. They constitute, as in the case of the United States, either a unilateral announcement or, as in the other case, the assumption of an obligation or the declaration of an already existing duty not to contribute by a positive act to rendering valid the results of an act which is in itself devoid of legal validity. This construction of non-recognition is based on the view that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer. That view applies to international law one of "the general principles of law recognized by civilized nations."[23] The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer. This does not mean that it cannot produce any legal results at all. For it may naturally entail a legal sanction against the law-breaker; it may in the interests of commerce and general security be a source of rights for third persons acting in good faith; it may, temporarily and provisionally, confer upon the

[22] Article 2 of the declaration reads as follows: "The Allied Powers not only formally declare the above to be their unalterable policy, but faithful to the principles which they have proclaimed concerning the authority of legitimate governments, they further agree to refuse to recognize any changes brought about by other than legal means" [as quoted by Cresson, *The Holy Alliance* (1922), p. 992, n. 2]. The basis of the doctrine of non-recognition is the illegality from the point of view of international law of the acts giving rise to the situation in question.

[23] Article 38 (3) of the Statute of the Permanent Court of International Justice.

wrongdoer a measure of protection of his possession; it may, if the rigid conditions of time and of other requirements have been complied with, crystallize into a legal right as the result of the operation of prescription. But to admit that, apart from well defined exceptions, an unlawful act or its immediate consequences and manifestations may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative.

The Maxim ex injuria jus non oritur in International Law

For reasons connected with the substantive and procedural weakness of international law, the operation of the principle *ex injuria jus non oritur* is there exposed to considerable strain and to wide exceptions. On the other hand, the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere. It is of interest to note the way in which the Permanent Court of International Justice has on a number of occasions given expression to the principle that no rights can be derived from an illegality. Thus in the *Free Zones* dispute between Switzerland and France the Court pointed out, in its Order of December 6, 1930, that France could not invoke against Switzerland any changes resulting from the unilateral transfer, which the Court held to be illegal, of the French customs line.[24] In the Advisory Opinion of March 3, 1928, the Court held that Poland was not entitled to invoke the fact that, contrary to her international obligations, she had failed to incorporate the relevant treaty into Polish municipal law.[25] In the Judgment of July 26, 1927, in the case concerning the *Factory of Chorzów*, the Court disposed of one aspect of the Polish objection to its jurisdiction by stating that it is "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question,

[24] Series A, No. 24.
[25] Series A/B No. 53, p. 75.

or from having recourse to the tribunal which would have been open to him."[26] In refusing, in August 1932, the Norwegian request for interim measures of protection against certain acts of Denmark with regard to the South Eastern Territory of Greenland, the Court drew attention to the fact that the acts in question could not in any event, or to any degree, affect the sovereign rights of Norway over the territory in question if such rights were otherwise valid.[27] In the final Judgment in that case, given on April 5, 1933,[28] the Court held that the Norwegian declaration of occupation and other measures taken by Norway in that connection constituted a violation of the existing legal situation and were accordingly "illégales et non valables" ("unlawful and invalid"). This finding, given by a practically unanimous Court, is the more significant if we consider that, as may be seen from the Dissenting Opinion of Judge Anzilotti, the Court probably had the opportunity to consider this aspect of the question. In his Dissenting Opinion Judge Anzilotti maintained that "the Court could not have declared the occupation invalid, if the term "invalid" signifies "null and void."[29]

Invalidity of Titles Based on Treaties Inconsistent with Former Treaty Obligations

The operation of the principle rendering invalid the results of an unlawful act shows itself with particular emphasis in the wider sphere of treaties inconsistent with the international obligations of the contracting parties. It is unlawful for a State to act or to agree to act in violation of the international rights of another State. In the matter of treaties it is unlawful for a State to conclude a treaty the performance of which would interfere adversely with the existing contractual rights of another State. A treaty which to the knowledge of both contracting parties is contrary to pre-existing treaty obligations binding upon one or both of the parties is, in general, illegal, invalid and unenforceable. It is unable to produce legal results between the parties. The doctrine of non-recognition does not invalidate the treaty in question; the latter is invalid *ipso facto*,

[26] Series A, No. 9, p. 31.
[27] Series A/B, No. 48, p. 285.
[28] Series A/B, No. 53, p. 75.
[29] Series A/B, No. 53, p. 95.

by reason of the circumstances of its creation. States subscribing to or bound by the principle of non-recognition merely announce that they will do nothing to cure the treaty and its consequences of the effects of invalidity inherent therein.[80] The example of illegality resulting from treaties conflicting with general or particular international law is of special importance in view of the fact that recent general treaties like the Covenant of the League of Nations and the General Treaty for the Renunciation of War of 1928 affected with illegality acts which international law had hitherto left to the unlimited discretion of States. The result has been an increase in the possible number of treaties rendered invalid in consequence of their being inconsistent with these recent obligations of a most comprehensive character. Thus a treaty imposed by the victor upon the vanquished as a consequence of a war undertaken by the former is void in all cases in which he had resorted to war contrary to his obligations under the Covenant of the League or the General Treaty for the Renunciation of War. It is void on the ground that the established rule disregarding the vitiating effect of duress does not apply to treaties concluded under compulsion and following upon wars undertaken by the victor in breach of these general international enactments. It is, moreover, invalid on the independent ground of being the result of a violation of the provisions of former treaties prohibiting or limiting recourse to war.

Ex factis jus oritur

The fundamental principle *ex injuria jus non oritur* is unaffected by the persuasive qualification expressed in the rival

[80] For a detailed discussion of the question of the validity of treaties inconsistent with previous treaty obligations and for judicial and other authority in support of the view put forward in the text see the author's article in the *British Year Book of International Law*, XVII (1936), pp. 60-65. See also, for a discussion of the same question with regard to contracts in municipal law, his article entitled "Contract to Break a Contract" in *Law Quarterly Review*, 52 (1936), pp. 494-529. See also the writer's note on the Opinions of Judges Van Eysinga and Schücking in the Oscar Chinn Case (*British Year Book of International Law*, XVI (1935), p. 164). But see Sir John Fischer Williams in *Hague Academy, Recueil des Cours* 44 (1933) (ii, pp. 281 *et seq.*), and in *Transactions of the Grotius Society*, XVIII (1935), pp. 120-123. See also, for references to British practice, McNair, *The Law of Treaties* (1938), pp. 116-124.

maxim *ex factis jus oritur*. Law is a product of social reality. It cannot lag for long behind facts. If it does, it runs the danger of heaping ridicule upon impotence and of contaminating, as the result, those fields of the law with which practice still conforms. This antinomy of law and fact is an abiding problem of jurisprudence. In a very real sense the validity of the law is not dependent upon its actual observance, just as the validity of grammar is not dependent upon our compliance with its rules in any given case. They are what have been called "normative rules." Law, once established, tells us what, under the pain of compulsion, is the right conduct; it is not a summary or a generalization of actual behavior; it is not affected by wrongful conduct. On the other hand, while law, so long as it is valid, is unaffected by a violation of its rules, its continuous breach, when allowed to remain triumphant, ultimately affects the validity of the law. As the sociological basis of the legal system as a whole is ultimately determined by the social realities of consent and power, so also the validity of its individual rules cannot in the long run be divorced from that foundation. Law conceived as an enforceable rule of conduct is to a large extent determined by what we judge to be socially feasible and practicable. Continued acquiescence in or toleration of illegality is a powerful element in the formation of such judgment.

However, while the law-creating influence of facts must be fully acknowledged, the following important considerations must be borne in mind: Although on occasions a cumulation of illegal conduct, when tolerated or left unpunished by the society, may have the consequence of changing the law and of sanctioning rights originating in illegality, no such result can be attributed to single acts of lawlessness, however successful. International law, being a weak law, is fully exposed to the impact of the phenomenon to which jurists have referred as the "law-creating influence of facts." But obviously, unless law is to become a convenient code for malefactors, it must establish a balance between the "law-creating influence of facts" and what is the essence of law, namely, that its validity is impervious to individual acts of lawlessness. It is one thing to say that law is ultimately based on facts of life and that it is a body of rules established by a system of force actually opera-

tive in society; it is another thing to say that breaches of the law, if successful, become part of the legal order. A balance must be found somewhere. It cannot be found in the immediate validation of the illegal act; it may be found in considerations of a general nature which would justify the legislator in incorporating the result of the illegality as part of the law. In the absence of such incorporation a provisional balance may be found, in the international sphere, in *de facto* recognition in a way combining the necessities of international intercourse with the maintenance of an essential legal principle.

The Validation of Illegality: (1) by Prescription

If the maxim *ex injuria jus non oritur* is a fundamental principle of international law no less than of municipal law, then the further question arises whether the results of the illegal act can ever be incorporated as part of international law. How much substance is there in the view that the principle of non-recognition is justly open to the reproach of immutability and rigidity? Can the effects of the illegal act ever be freed of the stigma of their origin? This, it is believed, may be done in three ways:

The first is the operation of the rule of prescription. The limits and conditions of the operation of acquisitive prescription in international law are not above controversy. Its requirements may not be as stringent as in the municipal sphere, but it would seem that the patent illegality of the purported acquisition, combined with continued protests on the part of the dispossessed State, are sufficient to rule out the legalization in that manner of the original act. Even assuming that prescription may be operative in the circumstances of the case, it must comply at least with the requirement of the lapse of a substantial period of time. To invoke the institution of prescription in municipal law as a reason for the immediate recognition or validity of internationally unlawful acts is to use the term "prescription" in a sense unknown to any system of law. In the course of the discussions concerning the recognition of the state of affairs established by the Japanese invasion of Manchuria and of the Italian annexation of Abyssinia, the principle of non-recognition was criticized by some on the ground that, after all, municipal law admitted the institution of prescrip-

tion.[31] Seeing that this particular criticism was voiced in the years immediately following the illegal acts in question, the reference to prescription must be regarded as having been used in a popular rather than a legal sense.

The Validation of Illegality: (2) by Consent of the Injured Party

Can the defect of illegality be waived and the title thus validated as the result of the consent of the State whose interests are primarily affected? It would seem that such consent might, as a rule, cure the original invalidity only when the right violated is grounded in a bilateral treaty or a customary rule operating exclusively for the benefit of the wronged State. However, in case of a violation of a multilateral treaty laying down rules of conduct whose observance is in the interest of all the contracting parties, it is difficult to see how waiver on the part of one of them—assuming that such waiver is juridically possible in the circumstances, *e.g.*, in case of duress —can free the original act of its unlawfulness and its results of the taint of invalidity. If the invalidity be due, for instance, to a breach of the General Treaty for the Renunciation of War, how can the consent of the defeated State alone influence the legal situation?

The Validation of Illegality: (3) by Recognition

There remains the possibility of curing the invalidity of the results of the unlawful conduct by recognition on the part of States proceeding, as it were, as members of the international community, *i.e.*, when acting in pursuance of the general interest and not with a view to promoting their private advantage. They may do it individually or collectively, although in the former case the presumption of the general good is less cogent. They may, by what may be called a quasi-legislative act, give legal force to a situation which is in the eyes of the law a mere nullity. The term "quasi-legislative" is here used because, while there is in the international sphere no legislation in the strict meaning of the term, there are cases in which, because of the absence of a legislature proper, a

[31] Thus we find Mr. Moore saying in 1937: "All systems of law recognize, by the doctrine of prescription and otherwise, that the recognition of accomplished facts plays, as a principle of certainty in peace, a large part in human affairs." [*Harvard Law Review*, 50 (1937), p. 436].

State or a number of States must fulfill the functions ordinarily reserved to legislation. This means that there are cases in which the assumption of legislative powers, if exercised in good faith and in the interest of general international welfare, is a course preferable to the perpetuation of a social anomaly. There is nothing obnoxious to legal principle in the idea of legalizing in this way the results of wrongful conduct. Such legislation consists, upon analysis, in the waiver by each of the recognizing States of its right, grounded in customary international law or in a treaty, to treat the new title as invalid. Professor Scelle has expressed the view that recognition *de jure* constitutes "a logical absurdity seeing that it is impossible to give juridical consecration to a situation which is contrary to law."[32] But it is difficult to see the force of that objection. There is no question here of legalizing the illegal act; the question is one of disregarding the effects of the illegality. The results of an illegal act are a legal nullity; they are legally non-existent. The wrongdoer acquires no right under it. But there is no logical objection to the community acquiescing, through collective or individual acts of its members acting in the general interest, in the assertion of a right which did not previously exist. To rule out that possibility altogether would mean to postulate for the law a degree of rigidity which may not always be compatible with justice and progress. Occasions may arise when the continuation of the policy or the obligation of non-recognition may not be conducive to the general good. When that happens, non-recognition may be adjusted to the requirements of international peace and stability. It may merge in a general, compensatory and remedial international settlement, as distinguished from individual acts of recognition resulting from opportunism, from short-sighted wisdom, from a complacent claim to a sense of realities, or from less worthy motives of direct political or commercial advantages. There is a difference between this manner of recognition on general grounds and the almost automatic incorporation of any successful breach of international law as part of the law of nations on the ground that the law must follow the facts. Law follows facts which are not unlawful. When they are unlawful, and in particular when they are unlawful in being acts of aggression against the

[32] Preface to Rousseau, *Le conflit italo-ethiopien devant le droit international* (1938), p. x.

very life of another member of the community in deliberate disregard of what the enlightened conscience of mankind has begun to regard as fundamental obligations of conduct—when they are thus illegal, a heavy and most responsible burden of proof falls upon those embarking upon such acts of legalization of the effects of illegality. Recognition of the effects of illegality may be a wise weapon of international policy or a bitter pill of unavoidable political necessity. Its merits in any particular case are not a matter for legal judgment so long as it is clear that in the opinion of those taking the decision non-recognition of the fruits of lawlessness is and remains an essential principle of law.[33]

The Significance of the Principle of Non-Recognition in International Law

There ought to be no doubt that the principle of non-recognition fulfills an important and, in the present stage of international organization, an essential function in the maintenance of the authority of the law. From the jurisprudential point of view the acceptance of the policy or of the obligation of non-recognition amounts to a vindication of the legal character of international law as against the "law-creating effect of facts." In a society in which the enforcement of the law is in a rudimentary stage, there is a natural tendency for breaches of the law to be regarded, for the sole reason of their successful assertion, as a source of legal right. Non-recognition obviates that danger to a large extent. It is the minimum of resistance which the law-abiding community offers to illegality; it is a continuous challenge and a continuous refusal to acquiesce in the wrong. In a sense, the effectiveness of non-recognition grows with the passage of years. For it brings into relief the contrast between the consolidating power of the successful defiance of the law and its status as a mere legal nullity in the

[33] The decision of Great Britain and of other countries to recognize, in 1938, the annexation of Abyssinia by Italy must be judged by considerations of this nature. Insofar as in the intention of its authors the recognition was contemplated as the first and indispensable condition of pacification of Europe and of the world, it is arguable that such recognition could be regarded as having been conceded for the common good of the international society. It was an act of international policy which could be criticized by reference to its political wisdom and its readiness to assume the probability of a radical change in the future conduct of the State responsible for the original illegality.

eyes of others. As such it adds substantial emphasis to the legal character of international law. In a very real sense it constitutes just the vital difference between a law worthy of the name and a law concealing behind its misleading designation the unfettered rule of violence.

The Principle of Non-Recognition and the Necessities of International Intercourse

Assuming that non-recognition is a weighty factor in the maintenance of the authority of international law, the further question arises whether it is necessarily an instrument of such rigidity as to constitute a serious impediment in the way of international intercourse. If it could be shown that adherence to the principle of non-recognition unavoidably results in ignoring altogether the existence of the power which actually exercises control and in avoiding anything which may bring the non-recognizing State in contact with the effective authority, then there might be room for the suggestion that the price paid for the symbolic upholding of a principle is unduly high. However, in normal circumstances there is nothing in the attitude of non-recognition which need necessarily constitute an obstacle in the way of normal intercourse—so long as the State against which it is directed does not insist on full and formal recognition of the results of the illegal act. *Ad hoc* agreements —bilateral and certainly multilateral—may be concluded with the unrecognized State or government or in respect of territory claimed by virtue of an unrecognized title—without it being necessary or permissible to strain such conduct into implied recognition. In the case of conquest, recognition of the *de facto* authority of the annexing State provides a sufficient basis for ordinary commercial intercourse and for the recognition of the legislative, administrative and judicial acts of the annexing State within the territory under its sway. Thus British Courts have repeatedly held that there is for the latter purpose no distinction between *de facto* and *de jure* recognition. They so held, in particular, after Great Britain had recognized in 1936 the *de facto* authority of Italy over Abyssinia while refusing to recognize the *de jure* sovereignty of Italy.[34] This *de facto*

[34] *Bank of Ethiopia* v. *National Bank of Egypt* (1937), Ch 513. With regard to *de facto* recognition of governments the same principle was affirmed in *Luther* v. *Sagor* (1921), 3 K.B. 532, and applied to *de facto* recognition of an

recognition of the Italian conquest was criticized on the ground that by means of a technical device a State may ignore its obligation in the matter of non-recognition. However, that criticism cannot be regarded as fully justified. Apart from the fact that at the same time the British Government and Courts acknowledged the juridical consequences attaching to the continued recognition of the Emperor as the *de jure* ruler of Abyssinia, the decisive consideration is that the value of non-recognition does not depend upon the degree of immediate hardship and inconvenience which it entails upon the law-breaker. Non-recognition is not a sanction in the nature of punishment aiming at bending the will of the wrongdoer by the overwhelming pressure of its immediate effects.[35] Its principal function must more accurately be conceived as an instrument for upholding the challenged authority of international law. That function it can perform without insisting on a rigid disregard of the realities of the situation. For that very reason *de jure* recognition is not, as a rule, an urgent practical necessity.[36]

While, therefore, *de facto* recognition may be open to criticism inasmuch as it renders non-recognition largely unreal by reducing the pressure inherent in non-recognition conceived as a sanction, it has the advantage of diminishing the urgency of *de jure* recognition. This was not sufficiently realized when the League of Nations first gave expression in 1932 to the

insurgent government *durante bello* in *Banco de Bilbao* v. *Rey* (1938), 2 K.B. 176 (1938), 2 *All E.R.* 253. In the *Arantzazu Mendi* (1938), 3 *All E.R.* 333 (1938), 4 *All E.R.* 269 (1939), 1 *All E.R.* 719, the Courts went to the length of granting to the insurgent government thus recognized jurisdictional immunity as against the government recognized *de jure*. For a criticism of this decision see Lauterpacht in *Modern Law Review*, June 1939.

[35] The realization of the meaning of the principle of non-recognition apart from its possible significance as a sanction ought to have assisted in discouraging assertions of the kind put forward after the occupation of Abyssinia by Italy, namely, that as sanctions under the Covenant are not punitive but preventive in their purpose, non-recognition ought to be abandoned as soon as the aggressor has achieved his unlawful design.

[36] From this point of view it may not be easy to follow the rigid alternative suggested by the British Secretary for Foreign Affairs at the meeting of the Council in May 1938. He said: "It is the considered opinion of His Majesty's Government that, for practical purposes, Italian control over virtually the whole of Ethiopia has become an established fact, and that sooner or later, unless we are prepared by force to alter it, or unless for ever we are to live in an unreal world, that fact, whatever be our judgment on it, will have to be acknowledged." (*Official Journal*, 1938, May-June, p. 335).

obligation of non-recognition. In the final recommendations of the Assembly's Report of February 24, 1933, it was laid down that the Members of the League will continue not to recognize the new régime either *de jure* or *de facto*. The Advisory Committee of the League which was concerned with the matter made recommendations calculated to combine the refusal of even *de facto* recognition with the necessities of intercourse. While recommending a number of measures such as the prevention of the accession of Manchukuo to international conventions and the refusal to admit official quotations in Manchukuoan currency, the recommendations did not oppose replacement of consuls, the issue of travelling documents by the consuls of the sending State and, at a later stage, technical agreements between the postal administrations of Members of the League and of Manchukuo.[87]

Objections to the Principle of Non-Recognition

The above considerations supply to some extent an answer to the criticism with which the principle of non-recognition has met from apparently opposed quarters. Inasmuch as it implied a measure of sanction for and repression of breaches of international law, it was assailed by those who believe that real progress in international affairs lies in the abandonment of any effort of collective enforcement of international law.[88] It has

[87] For the recommendations of the Committee of June 7, 1933, and May 16, 1934, see, respectively, *League of Nations Official Journal*, Special Suppl. No. 113, p. 11, and *Official Journal*, 1934, p. 430. On some questions connected with the non-recognition of Manchukuo see Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp. 516-535; Chailley in *Revue de droit international*, XIII (1934), pp. 151-174; Cavaré in *Revue générale de droit international public*, 42 (1935), pp. 5-99. For a discussion of the consequences of a complete refusal of recognition see McNair in *British Year Book of International Law*, XIV (1933), pp. 72-74, and Fischer Williams in *Hague Academy, Recueil des cours*, 44 (1933) (ii), pp. 294 *et seq.*

[88] Thus Mr. Moore, a former judge of the Permanent Court of International Justice, has criticized it in the following scathing terms: "Its chief weakness lies in the fact that those who employ it often must content themselves with futile words or must fight, while the adoption of the latter alternative would necessarily be a confession of failure. All systems of law recognize, by the doctrine of prescription and otherwise, that the recognition of accomplished facts plays, as a principle of certainty and peace, a large part in human affairs; and nations are but aggregations of human beings, who may not relish daily reminders of their shortcomings by others whom they may not deem above reproach, or wholly disinterested or unprejudiced." (*Harvard Law Review*, 50 (1937), p. 438); see above pp. 7, 21, for comment on this criticism; and Wild, *Sanctions and Treaty Enforcement* (1934), pp. 160-179. See also Sir

already been submitted that its effect as a sanction is not the only, and perhaps not the main function of the principle of non-recognition.

On the other hand, the principle of non-recognition has been exposed to criticism on the part of those who have seen in it a regrettable device for avoiding the fulfillment of substantial obligations accepted in the Covenant of the League of Nations,[80] by means of a declaration faulty in law and ineffective in practice. On the part of both these categories of critics it has been maintained that insofar as the principle of non-recognition postulates the necessity of recognition for the acquisition of title, it is not supported by international practice; that, insofar as it asserts the general invalidity of treaties and situations contrary to international law, it cannot be admitted as a sound legal doctrine; and that the principle of non-recognition is inadmissible insofar as it usurps for one State or group of States the right to invalidate international acts. These criticisms have already been discussed.

There is force in the view that the authority of international law may in the long run be lessened in consequence of the principle of non-recognition inasmuch as it may be used as an easy device for avoiding more substantial obligations for actively enforcing the law. However, it is clear that the device is not always an easy one; it cannot always be resorted to without the risk of immediate political disadvantages. Moreover, the obligations are in some cases, as in the General Treaty for the Renunciation of War, non-existent; in others, such as the Covenant of the League, they are less rigid and comprehensive than is commonly assumed. To that extent non-recognition is an addition to the forces making for the reality of international law. Even when there exists a duty to defend the rights of the injured State by means more substantial than a verbal declaration, such advantages as that declaration possesses are preferable to total inaction. It is not reasonable to assume that if only we succeed in disclosing the actual ineffectiveness of mere non-recognition, States will thereupon embark upon a more effica-

John Fischer Williams, referred to above, p. 6. But see Wright in *American Journal of International Law*, XXVI (1932), pp. 342-348, and XXXII (1938), pp. 526-35.

[80] See e.g., McNair, in *British Year Book of International Law*, xiv (1933), p. 73.

cious fulfillment of their obligations. In itself, the attitude of non-recognition shows that the law, though temporarily shorn of its strength, is a powerful factor so long as there is predominant the sentiment of its ultimate authority. Law is not necessarily disintegrated by impotence; but it is destroyed by voluntary submission to the lawlessness of force. Non-recognition prevents that contingency. For this reason it is impregnable as a legal principle.

Occasions may arise when the formal upholding of the law must be sacrificed on the altar of peace and for the sake of peace. In such cases it is for enlightened statesmanship to decide whether the emergency is of such a nature as ought to be met by the sacrifice of principles upon which peace ultimately depends. Notwithstanding such temporary sacrifices it cannot be said that practice reveals a tendency to jettison the principle of non-recognition. When in 1938 the British Government took steps to obtain release from the obligation of non-recognition in the matter of the Italian conquest of Abyssinia, it announced its firm attachment to the principle as such.[40] The attitude of non-recognition of Manchukuo has been maintained by most States. After the invasion of Czechoslovakia by Germany in 1939, the United States, Great Britain, France, Russia and other States announced that they regarded the German action as illegal and that no recognition would be granted to the change thus effected.[41] There was no disposition to act on the

[40] See above, p. 138, note 19.

[41] On June 20, 1939, a reply was given by the British Government in the House of Commons to the effect that His Majesty's Ambassador in Berlin was instructed to apply for an exequatur for a consul-general in Prague; and that although this step implied *de facto* recognition of the existing position, the Government had not changed the views previously expressed on the question, namely, that it did not recognize the legality of the new situation. There was, for a variety of reasons, no refusal to recognize the annexation of Austria by Germany in 1938. The change could be represented (not very convincingly) as being, in form, one of the voluntary merger on the part of a population clearly of the same race and language as the annexing State. It was subsequently confirmed by an apparently free vote of the population concerned. For some criticisms of the recognition by the United States of the annexation of Austria, see Garner in *American Journal of International Law*, XXXII (1938), pp. 421-423. The recognition on the part of the United States took the form of two Notes sent on April 6, 1938, informing the German Government that "the Government of the United States finds itself under the necessity as a practical measure" of closing its legation in Vienna, and that the Government of the United States was "under the necessity for all practical purposes of accepting" the fact of the cessation of the existence of Austria (*New York Times* newspaper, April 7, 1938).

view that success is a good reason for the immediate incorporation of the fruits of illegality as part of international law.[42]

The conclusions of the preceding examination of the place of the principle of non-recognition in international law may best be summarized in the form of propositions applying the relevant principles to the various aspects of the situation created in the Far East as the result of the invasion of China by Japan.

(i) The principle of non-recognition applies to international situations brought about by a violation of a treaty or any other internationally illegal act. The action of Japan must be regarded and has been declared by the overwhelming opinion of States and jurists to be contrary to the international obligations of Japan. With regard to the invasion of China in 1937, the Assembly of the League of Nations approved on October 6, 1937, the Report of the Far Eastern Advisory Committee stating that the action of Japan "can be justified neither on the basis of existing legal instruments nor on that of the right of self-defense," and that it is in contravention of Japan's obligations under the Nine Power Treaty of February 6, 1922, and under the Pact of Paris of August 27, 1928.[43] The Government of the United States was informed of these findings and on the same day a statement was issued by the Department of State saying that "the United States has been forced to the conclusion that the action of Japan in China is . . . contrary to the provisions of the Nine-Power Treaty of February 6, 1922, regarding principles and policies to be followed in matters concerning China, and to those of the Kellogg-Briand Pact of August 27, 1928."[44] In view of these pronouncements it is permissible to disregard any possible expressions of doubt on the question whether there has been any authoritative or impartial finding on the illegality of the Japanese action. This is a case

[42] Neither did there take place any automatic recognition of the changed status of Albania as the result of the invasion of that country by Italy in April 1939. On May 1, 1939, when a question was asked whether the new British Ambassador would be accredited to the King of Italy in his capacity as King of Albania, the Prime Minister announced in the House of Commons that the credentials of the new Ambassador signed on March 28 were addressed to "His Majesty the King of Italy, Emperor of Ethiopia" and that the Italian authorities expressed their willingness to accept the credentials signed in the above circumstances.

[43] *League of Nations Official Journal*, Special Suppl. No. 177, p. 37.

[44] *New York Times* newspaper, October 7, 1937.

in which the purpose and the reputation of international law are better served by an acknowledgment of undisputed facts than by misplaced judicial detachment.

(ii) It is not certain to what extent the powers interested in the solution of the Far Eastern problem—*i.e.*, the States bound by the Nine Power Treaty and Russia—are bound by a legal obligation of non-recognition. Any obligation of the signatories of the General Treaty for the Renunciation of War not to recognize changes brought about in violation of that instrument is of a moral rather than juridical nature. The signatories of the Nine Power Treaty (other than Japan) who are Members of the League of Nations are bound by the principle of non-recognition laid down in various pronouncements of the Assembly and Council and inherent in the wider obligations of the Covenant.

(iii) Whatever may be the position with regard to any legal obligation of non-recognition, all the signatories of the Nine Power Treaty (except Japan) and Russia have in various forms announced their intention or policy of non-recognition in respect of the Japanese invasion of China. While non-recognition, as originally acted upon by the Members of the League, was conceived as an instrument of direct pressure in partial substitution for sanctions, it has subsequently lost that character. Such element of sanction as it possesses is indirect in being the result of the moral and political consequences of an attitude of reprobation expressed in a continued non-recognition of the fruits of conduct stigmatized as illegal.

(iv) The true and principal significance of the principle of non-recognition in relation to the Japanese action in China—as indeed in respect of any other internationally illegal action—is one of upholding the authority of international law against successful assertions of illegal force. The importance of that function in periods of general relaxation of the restraints of international law cannot be overestimated.

(v) It has been shown that the principle of non-recognition thus conceived is compatible with a substantial measure of actual intercourse with an unrecognized authority or with respect to a situation whose validity is being denied. In view of this the maintenance of the principle of non-recognition with regard to the situation in the Far East need not constitute a serious impediment in the way of peaceful co-operation with

the local authorities in China and of protection of the interests of nationals of foreign powers.

(vi) In any peaceful settlement of the Far Eastern dispute the principle of non-recognition, if adhered to to the end will have the effect of making it impossible for Japan to rely on any changes brought about in the meantime as the result of the factual situation resulting from the invasion or as the result of any acts of the non-recognizing States otherwise capable of interpretation as constituting implied recognition.

(vii) It is probable that the principle of non-recognition as enunciated by the United States and other States has a bearing upon the legal invalidity not only of the accomplished results of the illegal conduct but also of situations arising in its intermediate stages. With regard to the situation in the Far East this may mean that the hostilities conducted by Japan, having their origin in an illegal act, do not confer upon her the rights which international law associates with a condition of hostilities between sovereign States. It is an established principle of international law that neutral States are not entitled to compensation for losses arising to them as the result of legitimate acts and measures of war, international or civil. This rule is based on the principle that civil war, *i.e.*, rebellion against the constituted authority, is not prohibited by international law and that, in the absence of express obligations to the contrary, war is not an illegal act. On the other hand, when the war is illegal in the sense that it is undertaken in violation of existing obligations or when the hostilities do not amount either to civil or to international war in its ordinary meaning or to a use of force short of war in accordance with international law, then the question arises whether the parties to the conflict or the party waging hostilities contrary to its international obligations is entitled to rely on the rule outlined above. On February 25, 1938, the Government of the United States announced that American citizens in China are under "no obligation whatsoever to take precautionary measures" against injury by the parties to the conflict, and that "if American nationals or property are injured in consequence of the operations of Japanese armed forces, the United States will be compelled to attribute" to Japan "responsibility for the damage."[45] The basis of that an-

[45] It has been suggested by Professor Borchard in *American Journal of International Law*, XXXII (1938), p. 536, n. 4, that that responsibility rests on

nouncement may have been the view that the hostilities in China, being neither a war in the meaning attached to it by international law nor a civil war, did not confer upon Japan the rights otherwise enjoyed by combatants in respect of the persons and property of aliens; or it may have been based on the view that, the action of Japan having been declared illegal, it could not produce legal consequences affecting States which have, by declaring the policy of non-recognition, expressly and in advance declined to treat such action as a source of any possible rights against them. In the latter case the principle of non-recognition may prove of considerable practical importance in any settlement based on law of the Far Eastern problem.

grounds outside the law. It is submitted that persuasive legal reasons may be adduced in support of the accuracy of the announcement as cited.

THE DOCTRINE OF NON-RECOGNITION

I

In recent years there has arisen in political literature a doctrine or cult which maintains that in the interests of law, order and stability it is desirable and necessary for states not to "recognize" annexations or political changes that have occurred in alleged "violation" of what is said to be "international law," *i.e.*, the Covenant of the League of Nations or the Kellogg Pact or, in the Far East, the Nine Power Treaty. This doctrine is motivated by a desire to discountenance the use of force in effecting changes in international relations, and it is assumed that by not recognizing the results achieved by force its employment will be discouraged. This school of thought would posit an international duty not to recognize the results of what they call "illegality," in the belief that united refusal to recognize will promote reliance upon and recourse to "law" when the necessity for changes becomes pressing.

While the more studious advocates of this doctrine admit that united action is practically impossible to obtain, as evidenced in their stock examples of Manchukuo, Ethiopia, Austria, Albania and Czechoslovakia; that the duty not to recognize "illegal" facts is little more than an aspiration; that in actual practice a *de facto* status must eventually be admitted and relations conducted with governments and states in being, however they originated; that war has not yet been outlawed and that its results often establish facts which are difficult to dispute or deny, they nevertheless think that there is more practical advantage in refusing to "recognize" facts deemed "illegal" than in recognizing them. This paper will attempt to refute the theories and assumptions upon which this conclusion is based, and will endeavor to show that it is not only impractical but that it creates but another means for postponing if not preventing understanding and stability in international relations.

The misconceptions in theory and fact which underlie the doctrine of non-recognition are, among others, as follows:

(1) that the international order is a perfectly legal order like the do-

mestic order, whereas in fact it is a primitive order among politically independent, militarily disparate, economically competing and potentially hostile entities;

(2) that it is possible to tell when a particular change, territorial or political, is "legally" or "illegally" effected, a moral and legal judgment from which the world heretofore had refrained because of its impracticability, its danger, its essential lack of criteria and the divisions and conflicts it would necessarily create;

(3) that recognition is the expression of approval and that when the change is disapproved, non-recognition operates as a deterrent or sanction against the "illegal" use of force, whereas recognition has not heretofore been deemed the expression of a moral judgment of any kind, but the practical means by which in international relations an unchangeable condition of fact, objectively established, is taken into account;

(4) that by some instrument or principle not identified the nations of the world have been authorized to pass upon the morality or legality of each other's acts, even when not directly affecting them, whereas no such instrument or principle exists;

(5) that when treaties of peace have been concluded contrary to prior obligations—presumably the assumed obligation not to go to war in violation of the Covenant of the League or the Kellogg Pact—the treaty of peace is illegal and should not be recognized, whereas actually such a doctrine misconceives the legal character of both the Covenant of the League and the Kellogg Pact, and even if it did not, it might make so many recent treaties invalid as to make the *status quo* indigestible and thus create more or less permanent disorder.

Realizing the impracticability of such an outcome of the doctrine, its more thoughtful exponents suggest that relations *de facto* must or may be entered upon with the disfavored new state or government, but that *de jure* recognition should be withheld as a mark of disapproval and of support for the law, which would thus be vindicated. This leaves us with the very slight and tenuous result that facts must after all be recognized, but with ill grace, with the making of faces and with threats of unfriendliness. But whereas even unpleasant or, if one will, even "illegal" acts tend by the passage of time or prescription to establish their claim to legal validity, which further weakens the supposedly law-promoting effects of non-recognition, the unfriendly refusal of so-called *de jure* recognition is charged with highly political and belligerent consequences, which the advocates of non-recognition seem to omit from their calculations.

Thus, the attempt at this day to revive the obsolete doctrine of legitimacy is fraught with new dangers to a world already quite sufficiently disorganized and at loggerheads. Far from contributing to the growth of law, the new doctrine, it is

believed, would make for further political hostility, hardly a fertile soil for law. Indeed, when analyzed, it will be found that there is usually little basis for the charge of "illegality" in political annexations,[1] that the biological, economic, historical and psychological forces which produce change can only be controlled by law and peaceful methods on demonstration to the expanding state of the advantage of such methods, and that the doctrine of non-recognition amounts to a rather churlish refusal to face unpleasant facts, giving to political judgments a fictitious legal justification. International law makes no place for a doctrine so destitute of constructive value. It was born in the post-war era when formulae were used as a substitute for political judgment in dealing with a disintegrating political structure. Political engineers with practical wisdom would have been more effective repairmen than lawyers inventing new phrases and formulae.

The doctrine of non-recognition is of a piece with the doctrine of combined action against "aggressors" to preserve the *status quo*, with the purported outlawry of all revolters against the *status quo*, with the doctrine of sanctions under Article 16 of the Covenant, all mistakenly advanced as contributions to the preservation of law. In actual fact, they have contributed

[1] In one sense, war generally involves a breach of treaties establishing friendly relations. But this has not been deemed a ground for considering the war "illegal" or refusing to acknowledge its results. Witness the treaties of peace of 1919. If the charge of illegality is based on the violation of treaties of friendship or of peace, then it may be said that political treaties are rarely deemed sacred and are usually subject to change when conditions warrant. Non-aggression pacts are sometimes abrogated before commencing hostilities, sometimes not. If the charge of illegality is based on the Covenant or the Kellogg Pact or the concept of "aggressor," it is submitted that the charge usually has no validity, unless the warring state admits that it is not fighting in self-defense, a circumstance which has never happened and is not likely to occur. When the refusal to recognize facts is based on the Covenant or the Kellogg Pact, we are in the field of political romance.

The Nine Power Treaty is an equally flimsy document. There was really no such thing in 1922 as the "political or territorial integrity of the Republic of China." The Open Door policy was actually accepted by none of Secretary Hay's correspondents. The fact that Russia, though vitally interested, was excluded from participation in the Treaty reveals the unrealistic character of that document. It was a *modus vivendi* for temporary stabilization, of a type not uncommon. But no legal case can, it is submitted, be built out of its vague terms. It is usual to try to find a legal ground for political hostility; it makes the case seem stronger.

For a discussion of the fragility of political treaties in historical perspective, see speech of Senator Shipstead in *Congressional Record* for October 16, 1939, pp. 797-805.

mightily by their vapidity, by their war-provoking tendencies, by their substitution of formula for practical wisdom, to the creation in Europe and in Asia of that emotional revolt and disorder they were designed to prevent. Lord Halifax on November 7, 1939, invoked with justification Emerson's famous remark that it will take all the ingenuity of the wise to repair the harm done by the good and that institutions to regulate European disorders must grow out of the roots of European experience and not be imposed from without by the inventions of what he might have called political soothsayers.

The practice of recognition is primarily American in origin, for it grew to institutional proportions with the American and Latin American Revolutions at the end of the eighteenth and early nineteenth centuries. The illegitimate succession of sovereigns had on occasion in Europe been refused acknowledgment by pope or king, but this was hardly associated with an international legal custom. When numerous American states were created by revolution, it seemed necessary, as a counteragent to the European doctrine of legitimacy, to provide the new states with a certificate of admission to the family of nations. The United States, eager to extend a helping hand to its Latin American imitators, was largely responsible for determining the objective indicia of recognition, namely, actual control of the government, effective establishment of the new state. In a sense, the doctrine of recognition implied a refutation of the doctrine of legitimacy and time has proved that as it is futile to quarrel with unchangeable facts, so recognition stabilizes conditions whereas non-recognition unsettles them.

In the United States the doctrine was associated with the doctrines of non-intervention and neutrality. Only toward the end of the nineteenth century, as will be described, was the doctrine of non-recognition introduced into Latin American conventions, at the instigation of nations that had been the victims of conquest. But as there is little incentive for conquest on this continent, the doctrine of non-recognition had only academic interest. Important changes in the European political scene were generally effected by the concert of Europe and thus rarely aroused the need for express recognition. Changes in Africa were effected by conquest or cession, but like discovery, were enlargements of existing states which neither invited nor received any certificate of recognition. Nobody "recognized"

the annexations effected by the United States in 1846 and 1899, after the wars with Mexico and Spain, nor, it is believed, was any nation asked to "recognize" the annexation of the Boer Republic in 1901. The idea that annexation requires express recognition of the expansion is an essential part of the post-war formulae designed to hold down the *status quo*.

The erroneous view that recognition signifies approval of the new state or government is partly responsible for the dangerous but correct conclusion that non-recognition marks disapproval and, we submit, is an act of hostility. While it is true that the premature recognition of the revolutionary government of Franco in Spain on the part of Germany and Italy constituted a mark of approval and that the refusal of the United States to recognize the conquest of Manchukuo and Ethiopia signified disapproval, such use of the legal institution of recognition is an act of sheer intervention in the internal affairs of another state which by solemn treaty the United States on this continent at least professes to renounce. It is also true that propinquity and hegemony have enabled the United States to use its recognition power as a make-weight in settling or unsettling various Latin American governments.

But this is a misuse of a legal institution to accomplish a form of intervention, which indeed is inherent in the doctrine of non-recognition. It would hardly be contended that United States recognition of Franco or even of the governments of Hitler and Mussolini constituted approval of these governments. The doctrine of recognition is susceptible of abuse, and it is abused when it is employed to signify approval. If it were to become customary thus to employ it each state would have to be armed to the teeth, for the unrecognized state or government might with its friends be in position to manifest its resentment at the withholding of that to which they felt themselves legally entitled. More or less permanent disorder would thus be substituted for at least a modicum of order. Thus the attempt to promote a more moral world by the use of precarious political methods of intervention is more likely to produce anarchy than law. The hope that law can thus be promoted is harbored largely by those who fail to recognize the incidental consequences of national sovereignty, now more painfully acute than ever, and the nature of the political and power world with which

international law must deal. It would be pleasant if international law could rise above the facts.

Perhaps another preliminary remark is justified. Much is made of the distinction between *de facto* and *de jure* recognition. These terms are used in several senses, hence confusion is natural. Formal recognition by conclusion of treaties or exchange of ambassadors, is often temporarily withheld from a new state or government for political reasons. Actually, this is a form of intervention, but during the interim between origin and recognition the relations with the new state or government are often characterized as *de facto*. The term is not one of art, and not one of international law, for the state or government actually exists and is therefore entitled to recognition, it is submitted, as a matter of right. Legally, it perhaps requires no third-party recognition, which is a convenience for the facilitation of normal intercourse. If anything, the term *de facto* is one of constitutional law designed to indicate that the constitutional forms have not been fully complied with. In Cromwell's day, it was used as a term of opprobrium to indicate the unconstitutional origin of Cromwell's government. Apparently, it has not lost that connotation. In international law the *de facto* government of a state is necessarily the *de jure* government. But the term *de jure* recognition is a kind of distortion to indicate that full and formal recognition has been extended as distinguished from incomplete or informal recognition, designated by the ambiguous term "*de facto* recognition." We speak also of local military government or of a faction in actual control of particular areas in war or civil war as a "local *de facto* government." The Confederacy was such a government. Legal consequences flow from these different types of status which it is not appropriate now to discuss.

With this introduction, we shall proceed to examine the practice of states, and particularly of the United States and Latin America, in the extension of recognition, and the theories developed under the régime of the Covenant of the League of Nations. We shall then endeavor to assess the effect of the new doctrine of non-recognition.

II

Inasmuch as the value of any policy is demonstrated only by the test of practical application, it is significant that the United States has had one major rule for recognition and that

it did not concern itself with subjective tests. The United States has granted recognition to new states, however formed, or new governments when they were in substantial control of their territories.[2] It has accepted the fact of successful annexation by making the necessary political adjustments.[3] There was little or no deviation from this rule until the Civil War when in order to defeat recognition of the Confederacy by European states, Secretary of State Seward raised the question of its illegal origin.[4] Historians generally agree that this was purely a matter of political expediency and was of such short duration that it is not indicative of any permanent policy.[5]

[2] See, for example, Secretary of State Adams to the President, August 24, 1818, *Moore's Digest* I, §§ 31, 78 and to the Spanish Minister, April 6, 1822, *id.* §§ 36, 88. This same control test appeared in the recognition on July 25, 1922, of Esthonia, Latvia and Lithuania: ". . . cognizance of the actual existence of these Governments during a considerable period of time and of the successful maintenance within their borders of political and economic stability." 1922 *For. Rel.* 2, 878 4.

As to new governments, as early as June 9, 1829, the Secretary of State instructed Mr. Moore in Colombia that *de facto* governments were to be treated as *de jure* governments. Moore *op. cit.*, §§ 49, 137. The same tests were applied in Europe. See, for example, the test described by Mr. Livingston for Greece on April 20, 1833, *id.* 127, and by the American chargé for Portugal in February, 1911, 1911 *For. Rel.*, 689.

[3] This has been true, even in case of the German annexation of Austria, in which the United States has made the necessary changes in diplomatic staff and has turned to Germany for payment on the Austrian debt; see *18 Press Releases*, 465-67 (April 9, 1938) and *19 Press Releases*, 375-379 (December 3, 1938).

[4] Goebel, *Recognition Policy of the United States* (New York, 1915) 171 *et seq.* While in a letter of November 7, 1792, to Gouverneur Morris, Jefferson raised the issue of a government "formed by the will of the nation substantially declared" (Moore, *op. cit.* I, §§ 43, 120), Seward was apparently the first to give the principle of popular support practical application as a test in granting recognition. In his instructions of May 7, 1868, on Peru, he tried to justify the rule: "When a Republican form of government is constitutionally established, we hasten to recognize the administration and to extend to it a cordial friendship. We do this because every state which constitutes itself a republic becomes by force of that very circumstance a bulwark of our own republic. We do not deny or question the right of any nation to change its republican constitution. We do not deny the right even to change it by force, although we think that the exercise of force can be justified in rare instances. What we do require, and all that we do require is when a change of administration has been made, not by peaceful constitutional process, but by force, that then the new administration shall be sanctioned by the formal acquiescence and acceptance of the people." *1868 Dip. Cor. 2*, 863; quoted in Goebel, *op. cit.* 202.

[5] Baty, "So-called 'de facto' recognition," (1921) 31 *Yale L. J.*, 477-8; Goebel *op. cit.* n. 3, 198 *et seq.*; Hackworth, "Policy of the United States in Recognizing New Governments in the Past Twenty-five Years," (1931) *Proc. Am. Soc. I. L.*, 121-122; Woolsey, "The Non-recognition of the Chamorro Government in Nicaragua," (1926), 20 *A.J.I.L.*, 544-545.

The deviations, such as they were, have been in regional policies on the recognition of new governments. When President Wilson came to the White House, he introduced a special rule which was intended to stifle South American unrest. He announced that he would not recognize governments which came into power by revolutions.[6] It is certain that, in taking this step, he knew that he was departing from the rules hitherto observed by the United States and that his Department of State questioned the wisdom of his plan.[7] Wilson supporters now argue that he was influenced by Colonel House's dream of a Latin American union and by belief in moral sanctions.[8]

Designed to smother revolutions, this policy had little effect in that direction. Indeed, it has shown clearly the futility of attempting to apply a single standard of political morality. Revolutions have continued to occur.[9] The doctrine has involved the United States in discussions of the internal affairs of other states which it was ill suited to conduct, with the unfortunate result that the most persuasive advocate was likely to obtain recognition of his revolution. Thus, the clever Federico Pezet was able to persuade Wilson that the Benavides government in Peru in 1915 was legal, while the less persuasive representatives of Tinoco in 1917 failed to convince Wilson. There was essentially no difference between the two revolutions. Furthermore, the Wilsonian rule has failed to meet the acid test of application by arbitral tribunals.[10] It has provoked bad feeling in the countries subject to its application.[11] As a result, it has been abandoned,[12] at least as a unilateral policy.[13]

[6] See circular sent to American diplomats, 1913 *For. Rel.*, 7.

[7] Baker, *Woodrow Wilson, Life and Letters*, IV, 249-64.

[8] Notter, *Foreign Policy of Woodrow Wilson* (1937), 233 *et seq.*

[9] See Jones, *The Caribbean Since 1900* (1936), 426 *et seq.*; Munroe, *The United States and the Caribbean Area* (1934), 211 *et seq.*

[10] Repudiated by Taft as arbitrator in the case between Great Britain and Costa Rica, involving the Tinoco administration; see (1924) 18 *A.J.I.L.*, 152-7; Hopkins (U. S.) v. Mexico, Sept. 8, 1923, *Opinions of Commissioners*, 1927, pp. 42 and 50.

[11] Moore, *Principles of American Diplomacy* (1918), 214. See, for example, De la Rosas, "Les finances de Saint-Domingue" (1914), 21 *Rév. gen. D.I.P.*, 564-8; Anderson, "Estatus del gobierno que preside en la Republica de El Salvador el General D. Maximiliano Hernandez, conforme a la constitucion y a los tratados de Washington" (1934), 22 *Rev. der. int.*, 17-32.

[12] Stimson so stated in his address of February 6, 1931, before the Council on Foreign Relations, *Latin American Series of the State Department*, No. 4, 7-8.

[13] In his speech of December 28, 1933, President Roosevelt said, "The maintenance of constitutional government in other nations is not a sacred obligation

This requirement of constitutional legitimacy had as a parallel, if not as its origin, the Tobar doctrine, which had been incorporated into the Central American treaties of 1907 and 1923. In a famous letter of March 15, 1907,[14] Carlos R. Tobar, a former Ecuadorian Minister of Foreign Affairs, had asserted that the American republics should agree to intervene in internal dissensions in the American hemisphere and that the intervention should take the form of non-recognition of *de facto* governments formed after revolts against the constitution. He felt that any objectionable qualities in the intervention would be removed by the fact that the action was taken under agreement. This was written into the Additional Convention to the General Treaty of Peace and Amity of December 20, 1907, along with a denial of the right to intervene in civil strife.[15] It was made stronger in 1923, by including no recognition of governments whose heads were persons who had been leaders in the *coup d'état* or related to such leaders, or who could not hold the office under the terms of the constitution. In the 1923 treaty no distinction was made between action by private and by public forces.[16]

While the United States did not sign these treaties, it announced that it would support this rule.[17] It has, however, reserved its freedom of action in doing so,[18] so that the decisions have been increasingly personal and subjective.

The 1907 treaty came to an end when Nicaragua refused to abide by the 1917 decision of the Central American Court on the Bryan-Chamorro treaty. The 1923 treaty was met at the outset by local opposition,[19] and failed to survive beyond its appointed span.[20] The philosophy which the treaties expressed

devolving upon the United States alone." *9 Press Releases,* 381 (December 30, 1933).

[14] French text given (1914) 21 *Rev. gén.* D I.P., 482-5.

[15] (1908) 2 *A.J.I.L.*, Supp., 229-31.

[16] Art. 2, (1923) 17 *A.J.I.L.*, Supp. 118-9. The prohibition of intervention was continued in Articles 4 and 14.

[17] Secretary of State Hughes to the Minister in Honduras, 1923, *For. Rel.* 2, 432-4.

[18] Stimson admitted that in case of difficulties "this Government must reserve its freedom of action." Speech of February 6, 1931, *op. cit.*, n. 11, 11-12.

[19] See Buell, "United States and Central American Revolutions," (1931) *For. Policy Rept.*, 192-3; Moreno, *Historia de las relaciones interstatuales de Centroamerica* (Madrid, 1928), 432 *et seq.*

[20] Thus, on January 26, 1934, the American chargé was instructed to extend recognition to El Salvador "in view" of El Salvador's denunciation of this

has been said not to be binding on non-signatories and is not to be regarded as a postulate of international law.[21] Its failure could not be more strikingly accentuated than by the announcement by Mexico of the "Estrada doctrine," a rule designed to avoid passing on the legal title of foreign regimes as acts derogatory to sovereignty.[22] The very introductory paragraphs of the Mexican statement show the irritating effect of these philosophies.[23]

No consideration of the policy of the United States in granting recognition would be adequate, which failed to take into account the attitude of Latin America and the pressure of its influence as demonstrated at conferences. The Latin American countries have always been interested in plans designed to maintain the political *status quo*. The action which they have taken at various conferences held in this hemisphere, whether or not the United States was present, is as significant for purposes of studying recognition policies as is the policy of the United States. Superficially, this might lead to the conclusion that the idea of collective action had triumphed. But it is a paper triumph only, although it weakens the consistency of the American rule.

The desire for multilateral agreements regulating continental affairs appeared in the early part of the nineteenth century. Bolivar considered the wisdom of such unity of action. The program of the first Panama conference contained points which had no other purpose. While that conference was abortive, it is important as marking a division of policy which was to endure for over a century. The instructions given the American delegates contained, among other things, directions that the

treaty and its previous recognition by Nicaragua, Honduras, and Guatemala. Costa Rica had previously denounced the treaty and recognized the new government in El Salvador. *10 Press Releases*, 51 (January 31, 1934).

[21] See, for example, Woolsey, *op. cit.* n. 4, 545; Larnaude, "Les gouvernements de fait," (1921) 28 *Rev. gén. D.I.P.*, 498-9.

In discussing this and the Wilsonian requirements, Fischer Williams has said that their incorporation into international law would amount to a rule of the divine right to democratic self-government according to well established constitutional principles. "La doctrine de la reconnaissance en droit international," 1933 *Acad. Dr. Int. 2 Rec.*, 248-50.

[22] Jessup (1931) 25 *A.J.I.L.*, 719-23; Castro Ramirez, "Doctrine estrada," (1931) 20 *Rev. der. int.*, 370-79; Nervo, "Doctrine estrada," (1931) 7 *Rev. Dr. Int.*, 436-45.

[23] Mexico pointed to the fact that she had been a chief sufferer from the rules of recognition which permitted foreign states to pass on questions of legitimacy. (1931) 7 *Rev. Dr. Int.*, 437.

Latin American countries did not bring up such issues again until 1923. In the Santiago conference held that year, economic conditions combined with League philosophies to produce new pressures. Consequently, the resolution of May 1, 1923, directed that there should be study of the means of "making more effective the solidarity of the collective interests of the American continent."[24] The preparatory work for that study was done by the American Institute of International Law. In Project No. 6, the 1923 treaty rule on recognition was specifically rejected.[25] While the Commission of Jurists which sat in 1927 did not support this proposition, it is significant that their Project No. 2 (States: existence—equality—recognition) in Article 3 forbids intervention, in Article 5 concedes the right of a state to "provide for its conservation and prosperity, and consequently to adopt whatever organization it thinks proper, to legislate concerning its own interests," and in Article 8 sets up objective tests for recognition.[26] These tests were (1) effective authority with probable stability and obedience from the population, especially in matters of military service and taxation, and (2) capacity to discharge pre-existing international obligations, to contract others and to obey the rules of international law. The fruition of this study came at Montevideo in 1933 in the convention on the rights and duties of states. In Article 8 it provided that "no state has the right to intervene in the internal or external affairs of another." In Article 11, there was established a rule of contrary philosophy: non-recognition of "territorial acquisitions or special advantages" obtained by force, whether by arms, diplomatic pressure or otherwise.[27] Secretary Hull subscribed to the doctrine of non-intervention and said that the United States accepted it, as shown in President Roosevelt's speeches and in his own speech of December 15, 1933. Brazil and Peru accepted the doctrine in principle but thought that it was not ready for codi-

[24] *International American Conference,* 1923 (Havana ed.), II, 340.

[25] See *A.J.I.L.* (1926) Sp. Supp., 310 and (1927) 21 *A.J.I.L.*, 312. Art. 5 is significant: "Every abnormally constituted government may be recognized if it is capable of maintaining order and tranquillity and is disposed to fulfill the international obligations of the nation."

[26] *A.J.I.L.* 1928 Sp. Supp., 240-1.

[27] *Rept. of American Delegates to the Seventh International American Conference of American States,* 166-8.

fication, because not all countries had signed the Rio anti-war pact.[28] In 1936 this rule on non-intervention was confirmed.[29]

Both these conferences proposed conventions requiring consultation and collective action. The Lima results do not vary the pattern. In view of the statements made by the United States when granting recent recognitions,[30] and President Roosevelt's pronouncements,[31] it would seem that, when writing international paper for New World consumption, the United States rejects the unhappy lessons of practical experience with the doctrines of constitutional legitimacy and has left the door open for collective action, even though allegedly returning to her objective tests for recognition.

III

Europe was reluctant to depart from objective tests, for even advocates of the doctrine of non-recognition admit that it was developed in the United States and accepted by the League as a link between the United States and the League system.[32]

[28] *Id.* 19-20.

[29] *Rept. of American Delegates to the Eighth International American Conference of American States,* 19 and 127-8.

[30] When the new regimes in the Argentine, Bolivia and Peru were recognized, the Secretary of State gave an elaborate statement of the justifications. He stressed not only their control of the country and the desire to fulfill international obligations but also the expression of an intent "to hold, in due course, elections to regularize its status." *3 Press Releases,* 192-3 (September 20, 1930). When the Brazilian regime was recognized on November 5, 1930, Brazil was reported as describing the composition of her government, *id.* 322-3 (November 8, 1930). When the Department of State announced the recognition of the Andrade government in Guatemala, it also announced that government's decree calling for elections. *4 Press Releases,* 21 (January 7, 1931). In his request for recognition of March 5, 1936, the President of Paraguay referred to the "democratic principles" which were to guide organization. *14 Press Releases,* 238-9.

[31] His speech of December 28, 1933, *op. cit.* n. 12, is particularly significant. He said: "It therefore has seemed clear to me as President that the time has come to supplement and to implement the declaration of President Wilson by the further declaration that the definite policy of the United States from now on is one opposed to armed intervention.

"The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone. The maintenance of law and orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all. It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern; and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors."

[32] Sharp, *Non-recognition as a legal obligation* (Liège, 1934) 135, 139, 140-3.

Thus, most non-American writers reject the doctrine of constitutional legitimacy as a form of intervention.[33] Larnaude expressly rejects the argument that the forms set up by a constitution are the only forms of popular assent.[34] Some authors would justify the denial of recognition if the new state or government indicates that it will not conform to the minimum standard of international conduct.[35] Redslob has difficulty in defining what such a standard would be and how implementing action could be distinguished from intervention.[36] It would seem, therefore, that, when considering problems of recognition apart from the League of Nations, non-American writers still respect the objective tests of control.

The American experience in the writing of international paper has been repeated in Europe. When recognition alone has been the subject of codification, a factual approach has been taken. The preamble and first article of the resolution on recognition adopted at the Brussels session of the Institut de Droit International are significant because the preamble recognized the right of states freely to organize and to change their institutions and the definitions set up by objective standards.[37]

[33] See, for example, Anzilotti, *Droit international* (Gidel trans.), I, 169-70; Cavaglieri, "Règles du droit de la paix," 1929 *Acad. Dr. Int. 1 Rec.*, 364-6; De Visscher, "Les gouvernements étrangers en justice," (1922) *Rev. Dr. Int. légis. comp.* (3e ser.), 150-1, 156, 157; Erich, "La naissance et la reconnaissance des états," 1926 *Acad. Dr. Int. 3 Rec.*, 476-7; Fischer Williams, *La doctrine de la reconnaissance en droit international*, 1933 *Acad. Dr. Int.*, 248-50; Larnaude, *op. cit.* n. 20, 469-70, 496-7; Podesta Costa, "Règles à suivre pour la reconnaissance d'un gouvernement de facto," (1922) 29 *Rev. gén. D.I.P.*, 51; Salvioli, "Droit de la paix," 1933 *Acad. Dr. Int. 4 Rec.* 51-3.

[34] Larnaude, *op. cit.*, n. 30, 493-5; cf. Fischer Williams, *op. cit.*, n. 31, 248-50.

[35] De Visscher, *op. cit.* n. 30, 154-5; Redslob, "La reconnaissance de l'État comme sujet de droit international," (1934) 13 *Rev. Dr. Int.*, 434-5.

[36] *Op. cit.* n. 30, 437.

[37] *A.J.I.L.* 1936 supp. 185. The significant paragraphs of the preamble are:

Considering that the independence and juridical equality of States demands respect for the right of nations to organize freely or to change their institutions;

Having in view the necessity for the satisfaction of the social needs to assure the continuity of States through the changes which they may undergo in their institutions;

Art. 1, for example, provides that:

The recognition of a new State is the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international community.

. . . .

The existence of a new State with all the juridical effects which are attached

The report on which this was based, prepared by Philip Marshall Brown, urged the inevitable continuity of international life and concluded that changes in government, however brutal and undesirable from an external point of view, should not bring any important modification in the continuity of a state's external life. Recognition was considered more political than juridical in nature, dictated by diplomatic considerations rather than thoughts as to its legal effect. Podesta Costa's substitution of "effective" governments for legitimate governments was approved. The draft resolution was annotated as to Article 1, with the explanation that recognition did not mean more than recognition of existence. *De jure* and *de facto* recognition were distinguished in the degree of relations which they implied, the former giving full diplomatic intercourse. The tests for *de jure* recognition were the objective tests of political organization of a stable character and the intent to obey the rules of international law.[38] The resolution as voted did not depart from these standards.

The pattern changes as soon as the League of Nations is injected into the problem. The doctrine of non-recognition received its support in codification, when the problem of collective action against an "aggressor" was considered. Thus, when the International Law Association met at Budapest and defined "aggressor," the resolution contained a rule for the denial of *de jure* recognition to the advantages acquired in violation of the Pact of Paris.[39]

When the doctrine of non-recognition is considered as an issue of League policy, the story falls into two chapters. Before the Stimson notes of 1932, most League supporters argued that Article 10 of the Covenant imposed a duty not to recognize any territorial changes accomplished in violation of League procedures,[40] but they were forced to admit that the question remained a matter for decision by individual states.[41] The efforts to implement Article 10[42] and to harmonize the Covenant

to that existence, is not affected by the refusal of recognition by one or more States.

[38] *1934 Annuaire*, 320-6, 342-3 and 346-7.

[39] (1935) 29 *A.J.I.L.*, 93.

[40] See, for example, Erich, *op. cit.* n. 30, 456.

[41] Erich, *op. cit.* n. 30, 456-8; Rousseau, "Le conflit-italo-éthiopien," (1938) 45 *Rev. gén. D.I.P.*, 85-6; Sharp, *op. cit.* n. 29, 117-9.

[42] Sharp, *op. cit.* n. 29, 119-21. In 1927 Finland had suggested the use of this doctrine to implement Article 10. While the committee approved it, it did not insert it in the report.

and the Pact of Paris[43] failed until the Stimson notes of 1932.

The League's acceptance of the Stimson doctrine is shown in the Council's statement of January 29, 1932,[44] and that of the Assembly on February 16, 1932,[45] on Manchukuo. This marks the apotheosis of strength for the doctrine of non-recognition. It is, however, significant that even here the Chinese delegate was unable to secure the use of strong wording.[46] When action under these declarations did not deter Japan, there was a gradual recession from the doctrine. While the debate on the Ethiopian problem contained references to it, only the Ethiopian delegate moved the adoption of a resolution refusing recognition on that basis—a resolution which was not put to a vote.[47] The resolution which was in fact voted was worded less strongly than that on Manchukuo, a fact which the Ethiopian delegation did not fail to point out. The entire record of the Ethiopian question at Geneva shows a refusal to face the issue squarely and an escape through procedural devices.

These two League experiments have forced resort to artificial techniques to avoid the appearance of recognition, such as the progressive elimination of any treaty form which would indicate recognition of Italy's new territorial claims, non-representation of Ethiopia at Geneva, the management of some Rome embassies by chargés, and the suppression of various matters of protocol.[48] With the passage of time, even these indications are diminishing in the face of the needs developed by increasing economic and even political contacts with both these "outlawed" states.

The effect of the adoption of the Stimson doctrine of non-recognition has been to foster a belief in a "higher law" as

[43] *Id.* 129-32. The proposition of Dr. Cornejo of Peru was rejected. It would have permitted the Secretariat to refuse registration to treaties concluded in violation of the Pact of Paris.

While the committee reported, nothing further was done as the time was not considered "politically opportune." The Argentine kept the road open for action on this doctrine, when it requested in this connection consideration of the Saavedra Lamas Anti-War Pact, which invoked it.

[44] 1932 *Off. J.*, 336-7, 383-4.

[45] *Id.*, Sp. Supp., 87-8.

[46] Sharp, *op. cit.* n. 29, 143.

[47] Summarized in Rousseau, *op. cit.* n. 38, 101-2.

[48] Rousseau gives a concise report on this, *op. cit.* n. 38, 104-20.

declared in the Covenant and the Pact of Paris. It has transformed the function of recognition from that of admitting changes in fact situations to that of passing judgment on all forms of state action. As an alternative to war but without the physical violence of war, recognition has been proposed as an instrument for influencing changes in the community of nations.[49] Lacking the coercive force of war[50] and demonstrated as impotent by American experience with Wilsonian doctrines, it has been foredoomed to failure in accomplishing anything constructive, while charged with destructive potentialities.

The dangers implicit in the change have been demonstrated already in the quarrels within the League as to the duties imposed by the Covenant, and by the gradual disintegration of the League system. They have been underscored by the artificiality into which efforts to apply the doctrine have forced state practice. Such a result has already been condemned in criticisms of *"de facto"* recognition.[51] The doctrine of non-recognition has forced state practice more deeply into avoidance of reality.[52] The U.S.S.R., Manchukuo and the Italian absorption of Ethiopia have continued to exist as political facts and to be dealt with as such in practice, while the world gave lip service to the theory of their non-existence. The process has not been conducive to peaceful relations among nations; it has, rather, tended to increase friction.

The deficiencies of the standards by which state action, such as treaties, would be tested under this system, are patent on the face of the doctrine which announces them. The Pact of Paris is subject to reservations which deprive it of all practical significance.[53] It is a declaration of policy, and never a statement of a rule of law. It is so vague as to invite controversy and to incite name-calling and war. Its peaceful propensities are non-existent.

[49] Fischer Williams, *op. cit* n. 30, 204, 238-9, 270-1; Jaffe, *Judicial Aspects of Foreign Relations* (1933), 111.

[50] Pointed out by McNair, "The Stimson Doctrine of Non-recognition" (1934) 14 *Brit. Year Bk. of I L.*, 71, 73-4.

[51] Baty, *op. cit.* n. 4; Borchard, "Unrecognized Governments in American Courts" (1932) 26 *A.J.I.L.*, 261-71.

[52] For example, the use of *modus vivendi* and treaty forms which do not require reference to the King of Italy by his new title.

[53] Borchard, "The Multilateral Treaty for the Renunciation of War," (1929) 23 *A.J.I.L.*, 116-20.

IV

It may thus be said that in spite of the efforts to make "collective security" a workable doctrine, the attempt has failed, leaving in its wake the wreckage of pious hopes and war-provoking formulae. The prestige of the League gave these formulae a remarkable vogue, especially in academic circles. The fact that they did not conform to the realities of practical life was either not observed or it was thought that the weight of propaganda could make them prevail. Even a religious devotion, which they elicited mainly in the United States, could not stifle revolt against a system which had no real roots in experience and which was associated with peace treaties which invited challenge and attack.

The view that non-recognition is an aid to the preservation of law and to the discouragement of force is an incident of the doctrine of collective security and has no sounder foundation than the structure of which it is a part. Theoretically, had the world been unified in its aims, were a collective judgment obtainable as to who is an "aggressor"—a mere heat-provoking term—were there a willingness to take united and uniform action to carry the judgment into execution, the centralized control and supervision of all territorial changes might be postulated. But in the light of the facts of disunity, adherence to the doctrine of non-recognition as a practical program can only invite trouble. If some nations recognize the change as necessary if not indeed "legal," and others who regard the change as unpleasant refuse, who are the "lawless" nations? Does Great Britain's participation in the Munich Agreement of 1938 make Britain lawless, or does it expose the impracticability of Article 10 of the Covenant? Was Britain not legally entitled to recognize the conquest of Ethiopia, which once she had opposed? Is it not sterile to suggest that for political reasons she and other members of the Council of the League waived their legal rights? Suppose they had not, what, except trouble, would that have accomplished? What nations are the entrusted judges of the "legality" of changes?

A collective, unified judgment might in theory have carried weight and the condemned nation might have been too weak to resist them all. But when the nations are divided, when important powers recognized the annexation of Ethiopia and

Austria and the new status of Czechoslovakia and Manchukuo, just what do the non-recognizing states accomplish, except the pleasure of making faces and the danger of reprisals and war? When things are in a state of flux, there may be some justification for delay, as in the case of Poland. But the old view that the law follows the facts, however unpleasant, had a certain stabilizing function which the theory of refusing *de jure* recognition to facts which some nations regard as "illegal" does not have, whereas its destructive potentialities are all too apparent.

The attempt to make a political order more legal than the facts warrant is merely the writing up of international paper and is a setback, not a spur, to effective international law. The better is often the enemy of the good, and the doctrine of non-recognition, it is submitted, is an exemplification of the maxim. To wind up an encomium of the doctrine of non-recognition by an admission that *de facto* recognition must in practice be accorded to unalterable facts but that *de jure* recognition ought to be withheld out of respect for law and order is a Pyrrhic victory and a confession of futility.

While a state is privileged not to recognize established facts, this is a political judgment, an act of reprisal or intervention entailing the consequences of such unfriendly act. For at least two centuries this type of retaliation has been known, but it is very doubtful whether it can be relieved of its political hostility by characterizing it as legally privileged by the doctrine of non-recognition. Such a political position of hostility must justify itself by its results. If war is avoided, if reprisal is avoided, and later the unwelcome fact becomes entrenched and impregnable, the lowest price is humiliation, and even that would be a fortunate outcome. If conditions of that type become prevalent, it necessarily will be a motivating factor for a reciprocal increase in armaments, for which we already have sufficient incentives. To be logical, proponents of the doctrine of non-recognition ought to outlaw all war, or at least all conquest and refuse to recognize the results of any conquest. But as conquest could only be abolished by creating conditions which remove all incentive to conquest and much of the matrix of power politics, non-recognitionists are perforce driven to the revival of the old distinction between the just and the unjust war, and admonish states to withhold recognition from the acquisitions or results of unjust wars. Inasmuch as nations do not

judge such matters objectively, but in the light of their interests, their prior commitments and other considerations having little or nothing to do with "justice," the dilemma of divided judgment and new causes for hostility arises to plague the defenders of collective security and non-recognition. And even though non-recognition seems mild and not violent, the resentment it may arouse may be no less provocative.

It has been said that when the lawfulness of the new title to territory is clear and undisputed, recognition is not necessary, but when it is not clear or is disputed, then recognition becomes necessary. But under this view, a new annexation will always be disputed or doubted by those who find it against their interest. Or are peace treaties like Versailles to constitute an exception to the rule? Hence mere political dislike of change can throw an annexation into the realm of conflict and strife by sanction of the new doctrine of non-recognition. Any challenge to the title would thus make universal recognition of the annexation necessary. Certainly this is not state practice and it might be unfortunate if it became so. For recognizing states the change would be a legal fact, for non-recognizing states a legal nullity. Moreover, when some nations object, they do so in all probability not for legal reasons but for political reasons. Yet they are given by this new doctrine a warrant for the hypocritical assertion that their non-recognition is due to their exceptional respect for the law which their recognizing sister states presumably do not possess. Thus, we would have a general state of unfriendly relations which, when multiplied by several instances, could produce an interesting state of hostility and confusion. The doctrine looks like a prescription for general disorder.

Certainly, states often challenge the legality of acts which directly affect them or their nationals. Great Britain declines to accept the confiscation by Mexico of British-owned oil properties. She holds Mexico responsible for that tort and demands that it be made good. But this has nothing to do with the doctrine of non-recognition of political changes, nor would it promote friendly relations if third states not directly involved were continually to call Mexico's attention to her shortcomings.

It has even been suggested that the consent of the injured party should not validate an act committed in violation of the

Kellogg Pact, and that all states have an interest in insisting upon its continued illegality. It was even suggested that outside powers might refuse on this ground to recognize a treaty of peace between Japan and China. Apart from the vacuousness of the Kellogg Pact, which in practice hardly admits of any violation, the suggestion shows the inroads on political stability made by the modern doctrines of universal intervention.

The inflation of the principle of intervention which the doctrine of collective security has brought in its train is a disturbing factor in international relations. If, as some commentators have said, Secretary Stimson's note of January 7, 1932, was not merely to protect the interests of the United States but to protect the entire world against an illegal act—a charge not proved —no credit is done to American diplomacy. One joust at crusading in Europe ought to be enough. To duplicate the performance in Asia might justify a convocation of the alienists. The ambiguous doctrine that war or trouble anywhere affects the entire world is used as a justification for intervention by any interloper and has resulted in a challenge to the principle of neutrality as immoral. Even if thoughtless and unworthy of respect, the harm done by this propaganda of intervention, clothed in the mantle of righteousness, is beyond calculation.

We return then to our thesis that the doctrine of non-recognition is based on certain premises and assumptions which have no validity in law or practice. The international order is not a perfect legal order, for it must perforce admit the results achieved by war, and it cannot be converted from a political to a legal order by the bootstrap method of signing a Covenant or Pact. Nations are not authorized to pronounce *ex parte* judgments that fellow-signatories of their treaties and more especially third party signatories of other treaties have "violated" those treaties or "international law." Such judgments made in self-interest and without hearing the party charged, even if otherwise practical, are worthless and would be arrived at by defiance of elementary due process. If a party to a private contract were to pass conclusively upon the question whether his co-contractor had violated the contract, and take action accordingly, the proceeding would be regarded with some suspicion if not wonder. Recognition, which should be made less and not more necessary, is not a certificate of approval, and it

should not be converted into one. This would be a sanction and would be resented by enough states to make the practice unprofitable. The doctrine of non-recognition would seem to make no constructive contributions to a disordered world, but on the contrary embodies potentialities for further disequilibrium.

APPENDIX

THE PROBLEM OF NON-RECOGNITION

A Summary Prepared from the Discussions of the Special Round Tables on International Law held during the meeting of the Institute of Pacific Relations at Virginia Beach, Virginia; November 22 to December 3, 1939.

THE PROBLEM OF NON-RECOGNITION

I

It was generally accepted that the parties to the League of Nations Covenant, the Argentine Anti-War Treaty, the Inter-American Treaty on Rights and Duties of States, have accepted obligations not to recognize territorial changes resulting from external violence against any party to the treaty, though this obligation had not been completely observed, especially by members of the League of Nations in the case of Ethiopia.

Whether the Nine Power Treaty and the Pact of Paris imposed duties not to recognize changes made by violence was considered doubtful by some, though such duties were asserted to exist with regard to the latter in the Budapest Articles of Interpretation.

It was accepted that under customary international law, there is no duty to refrain from recognizing changed conditions, which have been established in fact, in the sense that the opposing party has abandoned active resistance. Recognition prior to such establishment in fact of new states, of new governments, or of annexations of territory would, however, be a breach of customary international law. The occasional practice of not recognizing new conditions, illustrated in a number of instances since the early 18th Century, has not been sufficiently consistent to establish a rule beyond that stated, although this practice does indicate that there is no positive obligation of international law to recognize changes which have been established in fact.

II

Recognition has the legal effect of waiving whatever legal opposition the recognizing state might be able to make to the assertion by another state of a new legal title. If acts of the asserting state alone have been adequate to effect the legal change desired under international law, recognition is unimportant. This is normally true of acquisitions of territory by peaceful cession or of *territorium nullius* by occupation. If, on the other hand, the legal powers of other states are sufficient, if exercised, to prevent a good title, recognition is important. This has generally been true of assertions of title to territory within the domain of another state from insurrection or military occupation. It may be true of assertions of title by cession in areas where one or more third states have generally accepted regional interests, as illustrated in the Gulf of Fonseca case.

It would appear, therefore, that the legal significance of non-recognition flows from the legal interests in a given situation of the states which withhold recognition, rather than from the illegality of the acts which have lead to the assertion of title. Such acts may be illegal in the sense

that they provide the basis for a claim for damages by other states, even though they do not confer a power upon other states to frustrate the results achieved. An act may be in breach of obligation and yet not *ultra vires*, as for example, the ejection of a person from his land by an owner in breach of a license.

The maxim *jus ex injuria non oritur* therefore requires considerable qualification.

Many states may be injured by a cession of territory because their commercial treaties with the ceding state are no longer applicable in the ceded territory, but they have no power under such treaties to object to the cession. Consequently their recognition of such a cession is not necessary to confirm the title. It may even be that a state which has accepted an obligation not to cede a given territory has not, by such agreement, limited its powers of alienation. Consequently, a cession of the territory, while making the ceding state liable for damages because of breach of an international obligation, will establish a valid title for the state to whom the territory has been ceded.

According to the opinion of some, international law has never regarded violent occupation of foreign territory as sufficient in itself to give title to the occupant, and consequently, titles asserted on the basis of conquest are not legally valid until recognized by the state legally injured by the occupation. In the past, recognition by the state whose territory had been occupied, as for example by making a treaty of cession, or by long acquiescence in the occupation manifesting tacit recognition, has been deemed sufficient to give a valid title to the occupant. Recent non-aggression and anti-war treaties have given a legal interest to all parties to such treaties in case of violent occupation of the territory of one of their number by another. Because of this legal interest all the parties to the treaty share in the power of the victim to object to the transfer of title. Consequently, in such a case, the title of the occupant is not valid until all states, parties to such treaties violated by the incident have expressly recognized the new situation, or have acquiesced in it without protest for a long time.

Recognition therefore appears to be a quasi-legislative procedure whereby an *ultra vires* act may lead to the results desired by the state resorting to such act, because of a waiver of their objections by all states with a legal power to object.

III

There was not complete agreement whether the international legal order was better served by hampering the development of legal titles from *ultra vires* acts and thus discouraging resort to such acts, or by giving the sanction of international law to accomplished facts, thus giving certainty to the legal position at a given moment of history and facilitating legal change in accord with shifting political, economic and sociological forces.

Some feared that obligations or policies of non-recognition which proved ineffective to remedy usurpations of power might draw international law into contempt, and others feared that prompt recognitions of the results of such usurpations would draw international law into even greater contempt.

It was suggested, therefore, that the expediency of accepting obligations of non-recognition, or of pursuing policies of non-recognition, might depend upon whether or not the world is moving toward a more perfect legal order. It was accepted that non-recognition is a condition precedent to sanctions. Some, however, thought that if there are not to be effective sanctions, it may be useless to maintain the principle. Others pointed out that if effective sanctions can be developed, the maintenance of non-recognition may contribute to their development.

The question was raised whether non-recognition is itself a sanction. It was pointed out that Professor Lauterpacht, in his memorandum on the subject, did not imply from non-recognition a practice of refraining from commercial, consular or other relations with unrecognized states, or territory under the control of a state whose authority was not recognized. Furthermore, in fact, such *de facto* relations existed for many non-recognizing states in the case of Manchukuo. *De jure* non-recognition had not meant *de facto* non-recognition. To some this position seemed hypocritical and definitely harmful.

Some suggested that non-recognition ought to imply commercial and financial non-intercourse and thus should constitute an economic as well as a moral and legal sanction. The United States government had discouraged loans for the development of Manchukuo.

It was pointed out that, in any case, non-recognition would involve certain financial sanctions because investors would regard loans to territory controlled by an unrecognized authority as of doubtful security. It would also involve some political sanctions because the injured state would have the legal right in spite of its non-aggression or anti-force treaties to reacquire its rights by force as long as non-recognition continued. Finally, it would involve some moral sanctions because non-recognition would assure the injured state of the sympathy of the states withholding recognition, and so would encourage it to continue its struggle.

To the suggestion that a general duty of non-recognition or a general practice of non-recognition might crystallize the *status quo*, it was pointed out that the principle of non-recognition had usually been expressed, notably in the League Assembly's resolution on Manchuria, so as to forbid only *individual* recognition of the new situation. Thus, the principle did not preclude *collective* recognition of changes thought to be in the general interest, whatever may have been their origins. Thus interpreted, non-recognition would be merely an insistence that international legislation should be by collective procedures and not by a series of unrelated individual acts.

It was considered therefore that the problem of non-recognition in its political aspects is related to the problems of collective security and of peaceful change. It is designed to hamper individual complicity in, and tolerance of, usurpations of power by states, and to pave the way for a more effective international organization. Non-recognition in itself, however, is inadequate as a sanction and collective recognition in itself is inadequate as a legislative system. The practice of non-recognition, however, which has been frequent in the history of diplomacy draws attention to the need of more effective international sanctions and legislative pro-

cedures, and the acceptance of obligations of non-recognition in certain recent treaties imposes a responsibility upon states, parties to such treaties, to devote themselves to perfecting such procedures. The obligation not to recognize the fruits of aggression is not likely to continue as an institution of international law if this responsibility remains unfulfilled.

For the time being, the majority considered it desirable to maintain the obligations and policies of non-recognition already accepted and to support the doctrine, in the hope that the transition through which the world is passing can be made to yield a more effective international organization within which the non-recognition of *ultra vires* acts will be an essential element.

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